RECORD AND BRIEFS

AUG 10 2017
OFFICE OF THE CLERK
SUPREME COURT U.S.

Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

JOINT APPENDIX
(VOLUME 1)

JEFFREY B. WALL
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record for Petitioners

OMAR C. JADWAT
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, N.Y. 10004
ojadwat@aclu.org
(212) 549-2500

Counsel of Record for Respondents International Refugee Assistance Project, et al.

PETITIONS FOR WRITS OF CERTIORARI FILED: JUNE 1 AND JUNE 26, 2017
CERTIORARI GRANTED: JUNE 26, 2017

Additional Counsel Listed on Inside Cover

NEAL KUMAR KATYAL
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
neal.katyal@hoganlovells.com
(202) 637-5600

Counsel of Record
for Respondents
State of Hawaii, et al.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF MARYLAND

Docket No. 8:17-cv-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL., PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/7/17	1	COMPLAINT against All Defendants (Filing fee $ 400 r[illegible]pt number 0416-6486891.), filed by Jane Doe 1, John Doe1-4, Samaneh Takaloo, Allan Hakky, HIAS, Inc., International Refugee Assistance Project. (Attachments: # 1 Civil Cover Sheet)(Rocah, David) (Entered: 02/07/2017)
		* * * * *
2/7/17	5	MOTION for Other Relief *for Leave to Proceed Under Pseudonyms* by Jane Doe 1, John Doe1-4

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Declarations of John Does 1-4 & Jane Doe 1, # 2 Declaration of Nicholas Espiritu & Exhibits A through V, # 3 Proposed Order)(Cox, Justin) (Entered: 02/07/2017)
		* * * * *
2/9/17	25	Summons Issued 60 days as to Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump, U.S. Attorney and U.S. Attorney General(jf3s, Deputy Clerk) (Entered: 02/09/2017)
		* * * * *
2/10/17	40	NOTICE by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo of *Intent to File a Motion for Preliminary Injunction* (Cox, Justin) (Entered: 02/10/2017)
2/10/17	41	PAPERLESS NOTICE that a TELEPHONE STATUS CONFERENCE is scheduled to discuss 6 Notice of Intent to File Motion for

DATE	DOCKET NUMBER	PROCEEDINGS
		Leave to Proceed Under Pseudonyms and 40 Notice of Intent to File Motion for a Preliminary Injunction for February 13, 2017 at 3:30 p.m. Instructions for the call will be emailed to the parties. (ps2s, Chambers) (Entered: 02/10/2017)
		* * * * *
2/13/17	57	Case Management Conference held on 2/13/2017 before Judge Theodore D. Chuang.(FTR-KLS-2B.) (klss, Deputy Clerk) (Entered: 02/14/2017)
		* * * * *
2/14/17	59	ORDER deeming as filed 5 Motion for Leave to Proceed Under Pseudonyms; granting Plaintiffs leave to file Motions; scheduling a Motions hearing for March 28, 2017 at 9:30 a.m. Signed by Judge Theodore D. Chuang on 2/14/2017. (jf3s, Deputy Clerk) (Entered: 02/15/2017)
		* * * * *
2/22/17	63	MOTION for Discovery *on an Expedited Basis* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Exhibit 1 & 2) (Cox, Justin) (Entered: 02/22/2017)
2/22/17	64	MOTION for Preliminary Injunction *& MEMORANDUM OF LAW IN SUPPORT THEREOF* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Declarations and Exhibits (J.R. 1-166)) (Cox, Justin) (Entered: 02/22/2017)
2/24/17	65	SUMMONS Returned Executed by Jane Doe 1, John Doe 1-4, Samaneh Takaloo, Allan Hakky, HIAS, Inc., International Refugee Assistance Project. All Plaintiffs. (Attachments: # 1 Exhibit Attachment to Certificate of Service)(Jadwat, Omar) (Entered: 02/24/ 2017)
3/1/17	66	MEMORANDUM ORDER granting Doe Plaintiffs' Motion for Leave to Proceed Under Pseudonyms. Signed by Judge Theodore D. Chuang on 3/1/2017. (jf3s, Deputy Clerk) (Entered: 03/01/2017)
		* * * * *
3/6/17	79	NOTICE by Michael Dempsey, Department of Homeland Security, Department of State, John F.

DATE	DOCKET NUMBER	PROCEEDINGS
		Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump *of Filing of Executive Order* (Attachments: # 1 Exhibit A)(Bennett, Michelle) (Entered: 03/06/2017)
		* * * * *
3/8/17	81	RESPONSE in Opposition re 63 MOTION for Discovery *on an Expedited Basis* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump.(Garg, Arjun) (Entered: 03/08/2017)
3/8/17	82	RESPONSE in Opposition re 64 MOTION for Preliminary Injunction & *MEMORANDUM OF LAW IN SUPPORT THEREOF* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun) (Entered: 03/08/2017)
3/9/17	83	Request for Conference (Espiritu, Nicholas) (Entered: 03/09/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/9/17	84	PAPERLESS NOTICE that a telephone Case Management Conference is scheduled for 9:15 a.m. on Friday, May 10, 2017 to discuss 83 Request for Conference. Instructions for the call have been emailed to the parties. (nr, Chambers) (Entered: 03/09/2017)
3/10/17	85	Case Management Conference held on 3/10/2017 before Judge Theodore D. Chuang.(FTR-KLS-2B.) (klss, Deputy Clerk) (Entered: 03/10/2017)
3/10/17	86	ORDER directing Plaintiffs to file an Amended Complaint by Friday, March 10, 2017 by 5:00 p.m.; granting plaintiffs leave to file motions—deemed timely if filed by Friday, March 10, 2017 by 5:00 p.m.; Motions hearing scheduled for Wednesday, March 15, 2017 at 9:30 a.m. Signed by Judge Theodore D. Chuang on 3/10/2017. (jf3s, Deputy Clerk) (Entered: 03/10/2017)
3/10/17	87	PAPERLESS ORDER. Plaintiffs are granted permission to file an oversize brief as to the consolidated Motion for a Temporary Restraining Order, Motion for a Preliminary Injunction, and Motion for Leave to

DATE	DOCKET NUMBER	PROCEEDINGS
		Proceed Under a Pseudonym. The Government is granted permission to file an oversize brief for its consolidated Memorandum in Opposition to that filing. Briefs should not exceed 40 pages and should be in 12-point font, including footnotes, with 1" margins on all sides. Plaintiffs are granted permission to file their renewed Motion for Expedited Discovery as a separate motion, to which the Government will then be entitled to file a separate Memorandum in Opposition. Signed by Judge Theodore D. Chuang on 3/10/2017. (nr, Chambers) (Entered: 03/10/2017)
		* * * * *
3/10/17	89	(FILED IN ERROR) AMENDED COMPLAINT against All Plaintiffs, filed by Jane Doe 1, John Doe 1-4, International Refugee Assistance Project, Allan Hakky, Samaneh Takaloo, HIAS, Inc.. (Attachments: # 1 Amended Complaint [REDLINED]) (Keaney, Melissa) Modified on 3/10/2017 (slss, Deputy Clerk). (Entered: 03/10/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/10/17	90	MOTION for Other Relief for *Jane Doe #2 to Proceed Under Pseudonym* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Exhibit Decl. of Jane Doe #2) (Cox, Justin) (Entered: 03/10/2017)
3/10/17	91	MOTION for Temporary Restraining Order *and/or Preliminary Injunction* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Exhibit IRAP Declaration, # 2 Exhibit HIAS Declaration, # 3 Exhibit MESA Declaration, # 4 Exhibit John Doe 1 Declaration, # 5 Exhibit John Doe 3 Declaration, # 6 Exhibit Mateab Declaration, # 7 Exhibit Jane Doe 2 Declaration, # 8 Exhibit Mohomed Declaration, # 9 Exhibit Harrison Declaration, # 10 Exhibit Hausman Declaration Pt. 1, # 11 Exhibit Hausman Declaration Pt. 2, # 12 Exhibit Hausman Declaration Pt. 3)(Jadwat, Omar) (Entered: 03/10/2017)
3/10/17	92	Supplemental MOTION to Expedite *Discovery* by HIAS, Inc., Allan

DATE	DOCKET NUMBER	PROCEEDINGS
		Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4(Jadwat, Omar) (Entered: 03/10/2017)
3/10/17	93	AMENDED COMPLAINT against All Plaintiffs, filed by Jane Doe 1, John Doe 1-4, International Refugee Assistance Project, Allan Hakky, Samaneh Takaloo, HIAS, Inc.. (Attachments: # 1 Amended Complaint [Redacted])(Keaney, Melissa) (Entered: 03/10/2017)
3/11/17	94	NOTICE by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo *of Corrected Brief and Exhibits* (Jadwat, Omar) (Entered: 03/11/2017)
3/11/17	95	Amended MOTION for Temporary Restraining Order *and/or Preliminary Injunction* by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo (Attachments: # 1 Exhibit IRAP Declaration, # 2 Exhibit HIAS Declaration, # 3 Exhibit MESA Declaration, # 4 Exhibit John Doe #1 Declaration, # 5 Exhibit John Doe #3

DATE	DOCKET NUMBER	PROCEEDINGS
		Declaration, # 6 Exhibit Meteab Declaration, # 7 Exhibit Jane Doe #2 Declaration, # 8 Exhibit Mohomed Declaration, # 9 Exhibit Harrison Declaration, # 10 Exhibit Hausman Declaration Pt.1, # 11 Exhibit Hausman Declaration Pt.2, # 12 Exhibit Hausman Declaration Pt.3)(Jadwat, Omar) (Entered: 03/11/2017)
		* * * * *
3/12/17	98	RESPONSE in Support re 64 MOTION for Preliminary Injunction & *MEMORANDUM OF LAW IN SUPPORT THEREOF* filed by HIAS, Inc., Allan Hakky, International Refugee Assistance Project, Jane Doe 1, John Doe 1-4.(Keaney, Melissa) (Entered: 03/12/2017)
		* * * * *
3/13/17	113	RESPONSE to Motion re 90 MOTION for Other Relief *for Jane Doe #2 to Proceed Under Pseudonym* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Entered: 03/13/2017)
		* * * * *
3/13/17	117	RESPONSE in Opposition re 92 Supplemental MOTION to Expedite *Discovery* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun) (Entered: 03/13/2017)
		* * * * *
3/13/17	122	RESPONSE in Opposition re 91 MOTION for Temporary Restraining Order *and/or Preliminary Injunction* filed by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump.(Garg, Arjun) (Entered: 03/13/2017)
		* * * * *
3/14/17	130	REPLY to Response to Motion re 95 Amended MOTION for Temporary Restraining Order *and/or Preliminary Injunction* filed by HIAS, Inc., Allan Hakky, International

DATE	DOCKET NUMBER	PROCEEDINGS
		Refugee Assistance Project, Jane Doe 1, John Doe 1-4, Samaneh Takaloo.(Jadwat, Omar) (Entered: 03/14/2017)
		* * * * *
3/15/17	144	Motion Hearing held on 3/15/2017 re 95 Amended MOTION for Temporary Restraining Order *and/or Preliminary Injunction* filed by John Doe 1-4, HIAS, Inc., Allan Hakky, Jane Doe 1, International Refugee Assistance Project, Samaneh Takaloo before Judge Theodore D. Chuang.(Court Reporter: Cindy Davis—2B) (klss, Deputy Clerk) (Entered: 03/15/2017)
		* * * * *
3/16/17	149	MEMORANDUM OPINION. Signed by Judge Theodore D. Chuang on 3/15/2017. (aos, Deputy Clerk) (Entered: 03/16/2017)
3/16/17	150	ORDER granting in part and denying in part 95 Amended MOTION for Temporary Restraining Order and/or Preliminary Injunction. Signed by Judge Theodore D. Chuang on 3/15/2017. (aos, Deputy Clerk) (Entered: 03/16/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/16/17	151	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings (TRO Hearing) held on March 15, 2017, before Judge Theodore D. Chuang. Court Reporter Cindy Davis, Telephone number (301) 344-3228. Total number of pages filed: 87. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained from the Court Reporter or through PACER. Redaction Request due 4/6/2017. Redacted Transcript Deadline set for 4/17/2017. Release of Transcript Restriction set for 6/14/2017. (cd, Court Reporter) (Entered: 03/16/2017)
3/17/17	152	PAPERLESS ORDER finding as moot 91 Motion for a Preliminary Injunction and/or Temporary Restraining Order in light of 95 Amended Motion for a Preliminary Injunction and/or Temporary Restraining Order. Signed by Judge Theodore D. Chuang on 3/17/2017. (ps2s, Chambers) (Entered: 03/17/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/17/17	160	NOTICE OF APPEAL as to 150 Order on Motion for TRO, 149 Memorandum Opinion by Michael Dempsey, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump. (Garg, Arjun) (Entered: 03/17/2017)
		* * * * *
3/17/17	163	ORDER granting 90 MOTION for Other Relief for Jane Doe #2 to Proceed Under Pseudonym. Signed by Judge Theodore D. Chuang on 3/17/2017. (jf3s, Deputy Clerk) (Entered: 03/17/2017)
3/17/17	164	USCA Case Number 17-1351 for 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Department of State, Office of the Director of National Intelligence, John F. Kelly, Michael Dempsey, Donald J. Trump. Case Manager—Jeffrey Neal (krc, Deputy Clerk) (Entered: 03/20/2017)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/20/17	167	ORDER scheduling a telephone status conference for March 21, 2017 at 3:00 p.m. Signed by Judge Theodore D. Chuang on 3/20/2017. (jf3s, Deputy Clerk) (Entered: 03/20/2017)
3/20/17	168	NOTICE of Intent to File a Motion for Preliminary Injunction of EO § 6 by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed (Cox, Justin) (Entered: 03/20/2017)
3/21/17	170	Case Management Conference held on 3/21/2017 before Judge Theodore D. Chuang. (FTR-KLS-2B.) (klss, Deputy Clerk) (Entered: 03/22/2017)
3/22/17	169	ORDER directing parties to submit briefing on issues of the Court's jurisdiction over the proposed motion; continuing the scheduled Motions Hearing. Signed by Judge Theodore D. Chuang on 3/22/2017. (jf3s, Deputy Clerk) (Entered: 03/22/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/22/17	171	NOTICE by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed re 63 MOTION for Discovery *on an Expedited Basis Notice of Withdrawal* (Jadwat, Omar) (Entered: 03/22/2017)
3/23/17	172	PAPERLESS ORDER directing Plaintiffs to clarify whether they also intend to withdraw 92 Renewed Motion for Expedited Discovery. Signed by Judge Theodore D. Chuang on 3/23/2017. (ps2s, Chambers) (Entered: 03/23/2017)
		* * * * *
3/23/17	174	NOTICE by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed re 92 Supplemental MOTION to Expedite *Discovery Notice of Withdrawal* (Jadwat, Omar) (Entered: 03/23/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/17	175	PAPERLESS ORDER, in light of 174 Notice of Withdrawal, finding as moot 63 Motion for Expedited Discovery and 92 Renewed Motion for Expedited Discovery. Signed by Judge Theodore D. Chuang on 3/23/2017. (ps2s, Chambers) (Entered: 03/23/2017)
3/23/17	176	STATUS REPORT by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump(Garg, Arjun) (Entered: 03/23/2017)
3/24/17	177	MOTION for Leave to File *Motion for Preliminary Injunction* by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed(Espiritu, Nicholas) (Entered: 03/24/2017)
3/24/17	178	STATUS REPORT by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National

DATE	DOCKET NUMBER	PROCEEDINGS
		Intelligence, Rex W. Tillerson, Donald J. Trump (Attachments: # 1 Exhibit A)(Garg, Arjun) (Entered: 03/24/2017)
3/30/17	179	NOTICE by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does 1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed (Attachments: # 1 Exhibit A—Hawaii Preliminary Injunction Order)(Keaney, Melissa) (Entered: 03/30/2017)
3/31/17	180	RESPONSE in Opposition re 177 MOTION for Leave to File *Motion for Preliminary Injunction* filed by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump.(Garg, Arjun) (Entered: 03/31/2017)
4/5/17	181	REPLY to Response to Motion re 177 MOTION for Leave to File *Motion for Preliminary Injunction* filed by HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Jane Doe # 2, John Does

DATE	DOCKET NUMBER	PROCEEDINGS
		1 & 3, Muhammed Meteab, Middle East Studies Association of North America, Inc., Ibrahim Ahmed Mohomed. (Attachments: # 1 Joint Record 1-127)(Keaney, Melissa) (Entered: 04/05/2017)
4/10/17	182	MEMORANDUM ORDER denying without prejudice 177 Plaintiff's Motion for Leave to File Motion for Preliminary Injunction; staying courts resolution of Plaintiff's Motion for Preliminary Injunction. Signed by Judge Theodore D. Chuang on 4/10/2017. (jf3s, Deputy Clerk) (Entered: 04/10/2017)
4/14/17	183	NOTICE by Daniel Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex W. Tillerson, Donald J. Trump re 93 Amended Complaint re Intent to File *Unopposed Motion to Stay Response Deadline* (Attachments: # 1 Text of Proposed Order)(Garg, Arjun) (Entered: 04/14/2017)
4/19/17	184	ORDER staying 93 Amended Complaint, pending resolution of appellate proceedings. Signed by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Theodore D. Chuang on 4/19/2017. (jf3s, Deputy Clerk) (Entered: 04/19/2017)
5/10/17	185	ORDER of USCA granting the unopposed motion to supplement the record include the "Supplemental Declaration of John Doe #3," executed on May 4, 2017, granting the motion and supplements the record on appeal pursuant to Federal Rule of Appellate Procedure 10(e) and Local Rule 10(d) as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (Attachment: # 1 Declaration)(krc, Deputy Clerk) (Entered: 05/11/2017)
5/25/17	186	JUDGMENT of USCA affirming in part and vacating in part the Judgment of the USDC as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump. This judgment shall take effect upon issuance of this

DATE	DOCKET NUMBER	PROCEEDINGS
		court's mandate in accordance with Fed. R. App. P. 41. (Attachments: # 1 Published Opinion, # 2 Notice of Judgment)(krc, Deputy Clerk) (Entered: 05/25/2017)
5/31/17	187	ORDER of USCA amending the caption of the opinion in this case as follows: The words and its clients are added at the end of the party text for the first Plaintiff-Appellee listed in the caption to read, INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients. re: 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 05/31/2017)
5/31/17	188	AMENDED PUBLISHED OPINION of USCA amending and superseding opinion dated 5/25/17 as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director

DATE	DOCKET NUMBER	PROCEEDINGS
		of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 05/31/2017)
6/5/17	189	SUPREME COURT Remark—petition for writ of certiorari filed 6/1/17 and placed on the docket 6/2/17 as No. 17-1436, re: 160 Notice of Appeal (USCA No. 17-1351)(krc, Deputy Clerk) (Entered: 06/05/2017)
6/15/17	190	AMENDED ORDER of USCA amending its opinion filed 5/25/17, as follows: On page 127, line three of text—the word the immediately preceding the word precisely is deleted; also on page 127, line six of text—the word million is corrected to read billion as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 06/16/2017)
6/15/17	191	AMENDED OPINION of USCA affirming in part and vacating in part by superseding published opinion dated 5/25/17 as to 160 Notice of

DATE	DOCKET NUMBER	PROCEEDINGS
		Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 06/16/2017)
6/29/17	192	SUPREME COURT Remark—petition for writ of certiorari granted and application for stay of preliminary injunction granted in part (USCA No. 17-1351) re: 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 06/29/2017)
7/17/17	193	MANDATE of USCA takes effect today as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 07/17/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
7/17/17	194	ORDER of USCA recalling the mandate. The mandate issued this date due to clerical error is hereby withdrawn as to 160 Notice of Appeal, filed by Rex W. Tillerson, Department of Homeland Security, Daniel Coats, Department of State, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump (krc, Deputy Clerk) (Entered: 07/17/2017)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 17-1351

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL., PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/17/17	1	Case docketed. Originating case number: 8:17-cv-00361-TDC. Case manager: JeffNeal. [17-1351] (JSN)
3/17/17	2	DOCKETING NOTICE issued Re: [1] Case Initial forms due within 14 days. Originating case number: 8:17-cv-00361-TDC. Mailed to: Sonia Kumar, Brad Rosenberg, Nicholas Steiner. [17-1351] (JSN)
3/17/17	3	BRIEFING ORDER filed. Opening Brief and Appendix due

DATE	DOCKET NUMBER	PROCEEDINGS
		04/26/2017. Response Brief due 05/26/2017. Mailed to Sonia Kumar, Brad Rosenberg, Nicholas Steiner. [17-1351] (JSN)
		* * * * *
3/21/17	8	ORDER filed [1000046140] substituting party (FRAP 43). Daniel R. Coats substituted for Michael Dempsey. Copies to all parties. Mailed to: Sonia Kumar, Brad Rosenberg, Nicholas Steiner. [17-1351] (JSN)
		* * * * *
3/22/17	12	(ENTRY RESTRICTED) MOTION by Appellants Daniel R. Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, . Rex Tillerson and Donald J. Trump to expedite decision, to accelerate case processing.. Date and method of service: 03/22/2017 ecf. [1000047126] [17-1351] —[Edited 03/23/2017 by JSN] H. Thomas Byron
3/22/17	13	NOTICE ISSUED to Justin Bryan Cox, Nicholas David Espiritu, Lee P. Gelernt, Omar C. Jadwat, Debo-

DATE	DOCKET NUMBER	PROCEEDINGS
		rah Jeon, Melissa S. Keaney, Daniel Mach, David Robert Rocah, Karen C. Tumlin, Cecillia D. Wang and Heather Lynn Weaver for Paul Harrison, Jane Doe #2, International Refugee Assistance Project, HIAS, Inc., Middle East Studies Association of North America, Inc., Muhammed Meteab, Ibrahim Ahmed Mohomed and John Does #1 & 3 requesting response to Motion to expedite decision [12], Motion to accelerate case processing [12]. Response due: 03/22/2017. [17-1351] (JSN)
3/22/17	14	Corrected MOTION by Appellants Daniel R. Coats, Department of Homeland Security, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson and Donald J. Trump to expedite decision, to accelerate case processing.. Date and method of service: 03/22/2017 ecf. [1000047229] [17-1351] H. Thomas Byron
		* * * * *
3/22/17	22	RESPONSE/ANSWER by Jane Doe #2, John Does #1 & 3, HIAS,

DATE	DOCKET NUMBER	PROCEEDINGS
		Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to Motion to expedite decision [14], Motion to accelerate case processing [14]. [17-1351] Omar Jadwat
3/23/17	23	REPLY by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Motion to expedite decision [14], Motion to accelerate case processing [14].. [17-1351] H. Thomas Byron
		* * * * *
3/23/17	25	COURT ORDER filed [1000048277] granting Motion to accelerate case processing [14]; granting Motion to expedite decision [14]; scheduling oral argument. Argument Date or Session: 05/08/2017. Copies to all parties. [17-1351] (JSN)
3/23/17	26	Accelerated BRIEFING ORDER filed.. Opening Brief and Appendix due 03/24/2017. Response Brief

DATE	DOCKET NUMBER	PROCEEDINGS
		due 04/14/2017. Reply Brief due 04/21/2017. [17-1351] (JSN)
3/24/17	27	CASE CALENDARED for oral argument. Date: 05/08/2017. Registration Time: 12:15-12:30. Daily Arguments Begin: 1:00. Oral argument acknowledgment form due within 5 days. (BY ORDER ENTERED 4/13/2017, ARGUMENT START TIME CHANGED TO 2:30 P.M. ON MAY 8, 2017) [17-1351]—[Edited 05/07/2017 by PSC] (JLC)
		* * * * *
3/24/17	34	Joint FULL ELECTRONIC APPENDIX and full paper appendix by Appellants Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security. Method of Filing Paper Copies: courier. Date paper copies mailed dispatched or delivered to court: 03/27/2017. [1000049094] [17-1351] H. Thomas Byron
3/24/17	35	MOTION by Appellants Daniel R. Coats, Department of State,

DATE	DOCKET NUMBER	PROCEEDINGS
		John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security for stay pending appeal. Date of action to be stayed, if applicable:3/16/17.. Date and method of service: 03/24/2017 ecf. [1000049095] [17-1351] Sharon Swingle
3/24/17	36	BRIEF by Appellants Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security in electronic and paper format. Type of Brief: OPENING. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/27/2017. [1000049096] [17-1351] Sharon Swingle
3/24/17	41	OPENING BRIEF (PAPER) filestamped, on behalf of Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland

DATE	DOCKET NUMBER	PROCEEDINGS
		Security. Number of pages: [73]. Sufficient: YES. Number of Copies: [4]. Entered on Docket Date: 03/28/2017. Received by clerk date: 03/28/2017. [1000050605] [17-1351] (JSN)
3/24/17	42	APPENDIX (PAPER) file-stamped, on behalf of Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security. Total number of volumes (including any sealed): 1. Total number of pages in all volumes: 823. Total number of sealed volumes: 0. Sufficient? Yes. CD/DVD/Other exhibit? No. Number of Copies: 4. Entered on Docket Date: 03/28/2017. Received by clerk date: 03/28/2017. [1000050610] [17-1351] (JSN)
		* * * * *
3/27/17	40	COURT ORDER filed [1000049798] directing filing of responses to court inquiry. Reponses due by 03/30/2017. Copies to all parties. [17-1351] (JSN)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/29/17	48	RESPONSE/ANSWER by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to court Order [40],court Order to court inquiry [40]. [17-1351] Sharon Swingle
		* * * * *
3/30/17	50	RESPONSE/ANSWER by Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to court Order [40],court Order to court inquiry [40]. [17-1351] Omar Jadwat
		* * * * *
3/31/17	74	RESPONSE/ANSWER by Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc.

DATE	DOCKET NUMBER	PROCEEDINGS
		and Ibrahim Ahmed Mohomed to Motion for stay pending appeal [35]. Nature of response: in opposition. [17-1351] Omar Jadwat
		* * * * *
4/5/17	102	REPLY by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Response [74].. [17-1351] Sharon Swingle
		* * * * *
4/10/17	108	COURT ORDER filed [1000059317] granting initial hearing en banc (FRAP 35) Copies to all parties. [17-1351] (PSC)
		* * * * *
4/13/17	125	ORDER filed [1000061649] scheduling oral argument. Argument Date or Session: 05/08/17 at 2:30 pm. Copies to all parties.. [17-1351] (JSN)
		* * * * *
4/14/17	132	(ENTRY RESTRICTED) RESPONSE/ANSWER by Jane

DATE	DOCKET NUMBER	PROCEEDINGS
		Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to opening Brief [41]. [17-1351]—[Edited 04/20/2017 by JSN] Omar Jadwat
4/14/17	137	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Number of pages: [69]. Sufficient: YES. Number of Copies: [16]. Entered on Docket Date: 04/17/2017. Received by clerk date: 04/17/2017. [1000062773] [17-1351] (JSN)
		* * * * *
4/18/17	142	Corrected BRIEF by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc.

DATE	DOCKET NUMBER	PROCEEDINGS
		and Ibrahim Ahmed Mohomed in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 04/17/2017. [1000064113] [17-1351] Omar Jadwat
		* * * * *
4/21/17	221	BRIEF by Appellants Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/24/2017. [1000066914] [17-1351] Anne Murphy
		* * * * *
4/21/17	260	REPLY BRIEF (PAPER) filestamped, on behalf of Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United

DATE	DOCKET NUMBER	PROCEEDINGS
		States Department of Homeland Security. Number of pages: [40]. Sufficient: YES. Number of Copies: [16]. Entered on Docket Date: 04/25/2017. Received by clerk date: 04/25/2017. [1000068818] [17-1351] (JSN)
		* * * * *
4/24/17	254	MOTION by John Doe #8, Proposed Intervenor to intervene, to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal within time allowed by FRAP 29(e).. Date and method of service: 04/24/2017 ecf. [1000067990] [17-1351] Lena Masri
		* * * * *
4/24/17	256	NOTICE ISSUED to Donald J. Trump, United States Department of Homeland Security, Department of State, Rex Tillerson, Office of the Director of National Intelligence, John F. Kelly, Daniel R. Coats, International Refugee Assistance Project, Paul Harrison, Jane Doe #2, HIAS, Inc., Middle East Studies Association of North America, Inc., Muhammed Meteab, Ibrahim Ahmed Mohomed and

DATE	DOCKET NUMBER	PROCEEDINGS
		John Does #1 & 3, requesting response to Motion to intervene [254] . Responses due:04/27/2017. [1000068038].. [17-1351] (JSN)
		* * * * *
4/27/17	280	RESPONSE/ANSWER by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Motion to intervene [254], Motion to file amicus curiae brief [254]. Nature of response: in opposition. [17-1351] Lowell Sturgill
		* * * * *
5/3/17	283	COURT ORDER filed [1000075346] denying Motion to intervene [254]. Copies to all parties.. [17-1351] (JSN)
		* * * * *
5/4/17	287	MOTION by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed

DATE	DOCKET NUMBER	PROCEEDINGS
		to supplement record. Date and method of service: 05/04/2017 ecf. [1000076357] [17-1351] Omar Jadwat
5/4/17	288	(ENTRY RESTRICTED) Supplemental FULL ELECTRONIC APPENDIX and full paper appendix by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Method of Filing Paper Copies: mail. Date paper copies mailed dispatched or delivered to court: 05/04/2017. [1000076361] [17-1351] —[Edited 05/05/2017 by ABW] Omar Jadwat
5/5/17	289	Corrected Supplemental FULL ELECTRONIC APPENDIX and full paper appendix by Appellees Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Method of Filing Paper

DATE	DOCKET NUMBER	PROCEEDINGS
		Copies: mail. Date paper copies mailed dispatched or delivered to court: 05/04/2017. [1000076932] [17-1351] Omar Jadwat
5/5/17	290	SUPPLEMENTAL APPENDIX (PAPER) file-stamped on behalf of Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed. Sealed volume: N. Total number of volumes (including any sealed): 1. Total number of pages in all volumes: 4. CD/DVD/Other exhibit? N. Number of Copies: [16]. Entered on Docket Date: 05/05/2017. Received by clerk date: 05/05/2017. [1000076942] [17-1351] (AB)
5/5/17	291	RESPONSE/ANSWER by Daniel R. Coats, Department of State, John F. Kelly, Office of the Director of National Intelligence, Rex Tillerson, Donald J. Trump and United States Department of Homeland Security to Motion to supplement [287]. [17-1351] Sharon Swingle

DATE	DOCKET NUMBER	PROCEEDINGS
5/7/17	292	REPLY by Jane Doe #2, John Does #1 & 3, HIAS, Inc., Paul Harrison, International Refugee Assistance Project, Muhammed Meteab, Middle East Studies Association of North America, Inc. and Ibrahim Ahmed Mohomed to Response [291], Motion to supplement [287].. [17-1351] Omar Jadwat
5/8/17	293	EN BANC ORAL ARGUMENT heard before the Honorable Roger L. Gregory, Paul V. Niemeyer, Diana Gribbon Motz, William B. Traxler, Jr., Robert B. King, Dennis W. Shedd, G. Steven Agee, Barbara Milano Keenan, James A. Wynn, Jr., Albert Diaz, Henry F. Floyd, Stephanie D. Thacker and Pamela A. Harris. Attorneys arguing case: Mr. Jeffrey Bryan Wall for Appellants United States Department of Homeland Security, Department of State, Rex Tillerson, Office of the Director of National Intelligence, John F. Kelly, Donald J. Trump and Daniel R. Coats and Mr. Omar C. Jadwat for Appellees Paul Harrison, Jane Doe #2, International Refugee Assistance Project, HIAS, Inc., Middle East Stu-

DATE	DOCKET NUMBER	PROCEEDINGS
		dies Association of North America, Inc., Muhammed Meteab, Ibrahim Ahmed Mohomed and John Does #1 & 3. Courtroom Deputy: RJ Warren. [1000077923] [17-1351] (RW)
5/10/17	294	COURT ORDER filed [1000079712] granting Motion to supplement [287]. Copies to all parties.. [17-1351] (JSN)
5/25/17	295	PUBLISHED AUTHORED OPINION filed. Motion disposition in opinion denying Motion for stay pending appeal [35]. Originating case number: 8:17-cv-00361-TDC. [1000088535]. [17-1351] (JSN)
5/25/17	296	JUDGMENT ORDER filed. Disposition method: 17-1351 opn.p.arg. Decision: Affirmed in part, vacated in part. Originating case number: 8:17-cv-00361-TDC. Entered on Docket Date: 05/25/2017. [1000088546] Copies to all parties and the district court/agency.. [17-1351] (JSN)
5/25/17	297	OPINION ATTACHMENT. [17-1351] (JSN)
5/31/17	298	AMENDING ORDER filed. Copies to all parties.. [17-1351] (JSN)

DATE	DOCKET NUMBER	PROCEEDINGS
5/31/17	299	AMENDED OPINION filed amending and superseding opinion dated 05/25/2017. Originating case number: 8:17-cv-00361-TDC Copies to all parties.. [17-1351] (JSN)
6/5/17	300	SUPREME COURT REMARK—petition for writ of certiorari filed. 06/01/2017. 16-1436. [17-1351] (SJC)
6/15/17	301	AMENDING ORDER filed. Copies to all parties. [17-1351] (TW)
6/15/17	302	AMENDED OPINION filed amending and superseding opinion dated 5/25/17. Originating case number: 8:17-cv-00361-TDC. Copies to all parties. Annotation added to opinion reflecting Supreme Court history [17-1351]—[Edited 07/12/2017 by SJC] (TW)
6/29/17	303	SUPREME COURT REMARK—petition for writ of certiorari granted and application for stay of preliminary injunction granted in part. 06/26/2017 [17-1351] (SJC)
7/17/17	305	(ENTRY RESTRICTED) Mandate issued. ENTRY WITHDRAWN DUE TO CLERICAL ERROR.. [17-1351]—[Edited 07/17/2017 by JSN] (JSN)

DATE	DOCKET NUMBER	PROCEEDINGS
7/17/17	306	ORDER filed [1000119441] recalling mandate. Copies to all parties.. [17-1351] (JSN)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
A PROJECT OF THE URBAN JUSTICE CENTER, INC.,
ON BEHALF OF ITSELF AND ITS CLIENTS,
40 RECTOR ST, 9TH FL
NEW YORK, NY 10006;

HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS,
1300 SPRING STREET, SUITE 500
SILVER SPRING, MD 20910;

MIDDLE EAST STUDIES ASSOCIATION OF NORTH
AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS,
3542 N. GERONIMO AVENUE
TUCSON, AZ 85705;

MUHAMMED METEAB
43 JEFFERSON AVENUE
SPRINGFIELD MA 01107;

PAUL HARRISON
1800 FULLER WISER ROAD, #717
EULESS, TX 76039-4610;

IBRAHIM AHMED MOHOMED
631 BRENT BOULEVARD, APT. C3
COLUMBUS, OH 43228

JOHN DOES # 1 & 3;

JANE DOE #2, PLAINTIFFS

v.

DONALD TRUMP, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES
1600 PENNSYLVANIA AVENUE NW

WASHINGTON, D.C. 20035;
DEPARTMENT OF HOMELAND SECURITY,
SERVE ON: JOHN F. KELLY,
SECRETARY OF HOMELAND SECURITY
WASHINGTON, D.C. 20528;

DEPARTMENT OF STATE,
SERVE ON: REX W. TILLERSON,
SECRETARY OF STATE
2201 C STREET NW
WASHINGTON, D.C. 20520;

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,
SERVE ON: MICHAEL DEMPSEY,
ACTING DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, D.C. 20511;

JOHN F. KELLY
IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY
WASHINGTON, D.C. 20528;

REX W. TILLERSON
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE
2201 C STREET NW
WASHINGTON, D.C. 20520;

MICHAEL DEMPSEY,
IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON , D.C. 20511, DEFENDANTS

[Mar. 10, 2017]

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUCTIVE RELIEF

INTRODUCTION

1. On March 6, 2017, President Trump signed an Executive Order entitled "Protecting the Nation from Terrorist Entry into the United States" (the "March 6 Order" or "Executive Order"). The March 6 Order, which Plaintiffs challenge in its entirety, was intended and designed to target and discriminate against Muslims, and it does just that in operation.

2. Once effective, the March 6 Order will rescind and replace a similar Executive Order, signed on January 27, 2017 (the "January 27 Order"; together, we refer to the January 27 and March 6 Executive Orders as the "Executive Orders"), that had the same purpose and effect, the implementation of which prompted chaos and widespread civil rights abuses in airports across the country. As a result of legal challenges to the January 27 Order, numerous courts enjoined several key provisions that banned the entry to the United States of both refugees and the nationals of seven predominantly Muslim countries.

3. The major provisions of the March 6 Order are nearly identical to those of the January 27 Order. The new order bans individuals from six of the seven predominantly Muslim countries identified in the January 27 Order—Yemen, Libya, Somalia, Sudan, Iran, and Syria—from entering the United States for at least 90 days. Like the previous order, the March 6 Order suspends the entire United States Refugee Admissions Program for at least 120 days and reduces the number of refugees allowed into the United States for the current fiscal year from 110,000 to 50,000. The March 6 Order also contains language that associates Muslims

with violence, terrorism, bigotry, and hatred, inflicting stigmatic and dignitary harms. As a result, the March 6 Order will have the same discriminatory and stigmatizing impact on Muslims as the January 27 Order, which was itself a product of the President's clearly expressed intent to prevent Muslims from entering the United States.

4. While the March 6 Order contains various additions and revisions intended to insulate it from the legal claims that led to the enjoining of the January 27 Order, the Trump Administration has made clear that the March 6 Order is intended to effectuate the same policy outcome as the January 27 Order. The March 6 Order likewise suffers from the same fundamental constitutional and statutory defects as the January 27 Order.

5. The President has been very clear about his desire to prevent Muslims from entering the United States. He specifically promised to do so as a candidate. Presented with early objections to that proposal, he asked advisors how he could implement a Muslim ban indirectly, and they helped him craft the January 27 Order. President Trump further admitted on national television that through the January 27 Order he intended to favor Christian refugees over Muslim refugees. Rarely in American history has governmental intent to discriminate against a particular faith and its adherents been so plain.

6. After key provisions of the January 27 Order were preliminarily enjoined, a Trump Administration spokesperson explained that the revised Executive Order (which was ultimately signed on March 6) would have only minor, technical changes from the original

Order, and would thus produce the same basic policy outcome. That basic goal and outcome was, and remains, the exclusion of Muslims from the United States.

7. Like the January 27 Order, the March 6 Order violates two of our most cherished constitutional protections: the guarantee that the government will not establish, favor, discriminate against, or condemn any religion, and the guarantee of equal protection of the laws.

8. The United States was born in part of an effort to escape religious persecution, and the Religion Clauses of the First Amendment reflect the harrowing history of our Founders. More than two centuries later, our nation is one of the most religiously diverse in the world and has become a sanctuary for immigrants and visitors of all faiths and no faith, including refugees fleeing persecution in their homelands.

9. Both the January 27 Order and the March 6 Order fly in the face of our historical commitment to welcoming and protecting people of all faiths, and no faith, and it violates the "clearest command of the Establishment Clause"—"one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

10. The United States was likewise founded on the principle that all people—regardless of their faith or where they are born—are created equal. The March 6 Order—which, like the January 27 Order, was motivated by animus toward Muslims and expressly dis-

criminates on the basis of national origin—runs afoul of this core constitutional value as well.

11. Plaintiffs challenge the March 6 Order under the Establishment Clause; the equal protection guarantee of the Due Process Clause of the Fifth Amendment; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*; the anti-discrimination provisions of the INA, 8 U.S.C. § 1152(a)(1)(A); the Refugee Act of 1980, as amended; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D).

12. Plaintiffs respectfully request that the Court issue appropriate declaratory relief and preliminarily and permanently enjoin the March 6 Order as a whole.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Plaintiffs' claims under the U.S. Constitution and federal statutes. The Court has additional remedial authority under 28 U.S.C. §§ 2201-02.

14. Venue is proper under 28 U.S.C. §1391(e) and Local Rule 501.4.a.ii. Defendants are officers or employees of the United States acting in their official capacities, and agencies of the United States. Plaintiffs HIAS and John Doe #1 reside in the Southern Division of this District. No real property is involved in this action.

PARTIES

15. Plaintiff International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc., provides and facilitates free legal services for

vulnerable populations around the world, including refugees, who seek to escape persecution and find safety in the United States and other Western countries.

16. Founded in 2008 as a student organization at Yale Law School, IRAP initially served Iraqi refugees who were victims of the Iraq War. In 2010, IRAP became part of the Urban Justice Center and now has offices in New York as well as the Middle East. IRAP has expanded its client base since its inception to assist refugees from Afghanistan, Egypt, Eritrea, Ethiopia, Iran, Jordan, Kuwait, Libya, Pakistan, Palestine, Somalia, Sudan, Syria, Turkey, and Yemen. Through in-house casework, as well as supervision of 1,200 students from 29 law schools in the United States and Canada and pro bono attorneys from over 75 international law firms and multinational corporations, IRAP directly assists thousands of refugees in urgent registration, protection, and resettlement cases every year.

17. IRAP lawyers provide legal assistance to refugees and other immigrants to the United States throughout the resettlement process. IRAP lawyers advise their clients on the resettlement process, write legal briefs and compile physical evidence in advance of clients' interviews with United States Citizenship and Immigration Services ("USCIS"), prepare them for their oral testimony in their interviews, and then conduct regular follow-up with USCIS until the clients are safely resettled.

18. IRAP assists many individuals in the United States who need assistance filing family reunification petitions for family members overseas. IRAP also assists U.S.-based Iraqi and Syrian citizens and lawful

permanent residents in filing petitions in order to get their family members overseas into the Direct Access Program of the United States Refugee Admissions Program. Finally, IRAP also assists countless Iraqi and Afghan citizens who have served the United States government to obtain Special Immigrant Visas, with the support of U.S. citizen veterans of Iraq and Afghanistan.

19. Since its inception, IRAP has helped to resettle over 3,200 individuals to 55 countries, with the majority resettled to the United States. It has provided legal assistance to nearly 20,000 more individuals.

20. The overwhelming majority of IRAP's clients, including clients abroad and those within the United States, identify as Muslim.

21. As set forth in greater detail below, implementation of the Executive Orders has caused substantial harm to IRAP and its clients, and will continue to harm them. IRAP asserts claims on behalf of itself and its clients in the United States and abroad. The rights of its clients that IRAP seeks to vindicate here are inextricably bound up with its organizational mission and purpose, and its clients face numerous hurdles to bringing this suit in their own name.

22. Plaintiff HIAS, the world's oldest refugee resettlement agency, is a faith-based organization that aims to rescue people around the world whose lives are in danger. The organization works toward a world in which refugees find welcome, safety, and freedom. Founded in 1881 to assist Jews fleeing pogroms in Russia and Eastern Europe, HIAS now serves refu-

gees and persecuted people of all faiths and nationalities around the globe. Since HIAS's founding, the organization has helped more than 4.5 million refugees start new lives.

23. HIAS has offices in twelve countries worldwide, including headquarters in Silver Spring, Maryland, which is its principal place of business, and another domestic office in New York City. HIAS also provides resettlement experts in support of the United Nations High Commissioner for Refugees (UNHCR). Refugee resettlement lies at the heart of HIAS's work in the United States. It is one of nine non-profit organizations designated by the federal government to undertake this humanitarian work through contracts with the Department of State and the Department of Health and Human Services.

24. In 2016, HIAS provided services to more than 350,000 refugees and asylum seekers globally. HIAS's client base includes refugees abroad and in the United States who are from Syria, Iraq, Iran, Sudan, Somalia, Yemen, Ukraine, Bhutan, the Democratic Republic of Congo, Afghanistan, Eritrea, Tanzania, Ethiopia, Burundi, South Sudan, Uganda, Russia, Belarus, and Burma, among other countries. Many of these clients are Muslim.

25. HIAS provides programs and services to refugees, including employment, psychosocial, and legal services. HIAS has also been approved to refer cases of particularly vulnerable refugees directly for third-country resettlement to the United States and other countries. Around the world, HIAS provides legal ser-

vices to protect the rights of refugees, and to register, document, and secure the status of refugees.

26. HIAS is also assigned clients via the State Department's allocation process, which determines which refugee clients will be resettled by HIAS. For clients who have newly arrived in the United States, HIAS either provides direct resettlement services or partners with other organizations across the country to do so. These services include arranging housing and providing essential furnishings, food, clothing, initial cash assistance, initial health screening, cultural and community orientation, and, through case management services, assistance with enrollment in English language classes and employment services, as well as referrals for health and legal services.

27. HIAS, directly and through affiliated agencies, also provides assistance to refugee and asylee clients in the United States who are seeking to gain entry for family members abroad who still face persecution. As set forth in greater detail below, implementation of the January 27 Order has caused substantial harm to HIAS and its clients, and the March 6 Order will continue to harm them. HIAS asserts claims on behalf of itself and its clients. The rights of its clients that HIAS seeks to vindicate here are inextricably bound up with its organizational mission and purpose, and its clients face numerous hurdles to bringing this suit in their own name.

28. Plaintiff Middle East Studies Association (MESA) is a non-profit learned society that brings together scholars, educators, and those interested in the study of the Middle East from all over the world. From its inception in 1966 with 51 founding members,

MESA has increased its membership to more than 2,400 and now serves as an umbrella organization for fifty-five institutional members. MESA's membership includes both graduate students and faculty working in the field of Middle East studies.

29. As set forth in greater detail below, MESA and its members will be harmed in a variety of ways by the Executive Order. MESA asserts claims on behalf of itself and its members.

30. Plaintiff John Doe #1 is a lawful permanent resident and national of Iran who lives in Montgomery County, Maryland. He is a scientist. He came to the United States in 2014 on an exchange visitor visa. In 2016, he obtained his lawful permanent resident status through the National Interest Waiver program for people with extraordinary abilities. His pioneering scholarly works are recognized as cutting edge in the sciences. Both John Doe #1 and his wife, who is not a party, are non-practicing Muslims.

31. Plaintiff John Doe #3 is a lawful permanent resident and national of Iran who lives in Anne Arundel County, Maryland. He came to the United States in 2011 through the Green Card lottery. John Doe #3 worked as a teacher in Iran, and currently works in the engineering field.

32. Plaintif Jane Doe #2 is a U.S. citizen of Syrian origin who lives in Mecklenburg County, North Carolina. She is from a Muslim family and is enrolled in college where she is studying to become a healthcare technician. She filed a family-based visa petition for her sister who is a Syrian refugee currently living in a

refugee-designated area in Saudi Arabia with her husband and two young children.

33. Plaintiff Mohammed Meteab is a lawful permanent resident of the United States who lives in Springfield, Massachusetts. He came to the United States in 2015 as a refugee along with his wife and two children. He now has a third child, a U.S. citizen born in the United States. Plaintiff Meteab is one of five brothers; he, his wife, his two elder children, and all five brothers are Iraqi. One brother came to the United States as a refugee. The other three brothers have been approved as refugees by the United Nations High Commission for Refugees and remain in Jordan, awaiting resettlement. Two of the three are approved to come to the United States but do not yet have travel documents. Mr. Meteab is a Sunni Muslim, as are his brothers.

34. Plaintiff Paul Harrison is a citizen of the United States by birth who lives in Euless, Texas. In November 2015, he met his partner, an Iranian national who lives in Tehran, Iran. In March 2016, Mr. Harrison petitioned for his partner—now his fiancé—to join him in the United States on a K-1 visa. After his November 2016 interview at the U.S. Embassy in Ankara, Turkey, his application was approved and administrative processing complete on January 17, 2017. A visa has not yet been issued, however.

35. Plaintiff Ibrahim Ahmed Mohomed is a United States citizen of Somali origin who lives in Columbus, Ohio. He came to the United States as a refugee in 2009. In 2013, his wife and nine children were approved to come to the United States as refugees but they are

still in Ethiopia awaiting authorization to travel to the United States to join Mr. Mohomed. Mr. Mohomed and his family are Muslim.

36. As set forth in greater detail below, implementation of the Executive Orders has caused and will continue to cause harm to Plaintiffs Meteab, Harrison, Mohomed, Jane Doe #2 and John Does #1 and #3 (collectively, the "Individual Plaintiffs").

37. Defendant Donald Trump is the President of the United States. He is sued in his official capacity. In that capacity, he issued the Executive Orders challenged in this suit.

38. Defendant U.S. Department of Homeland Security ("DHS") is a cabinet-level department of the United States federal government. Its components include U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE"). CBP's responsibilities include inspecting and admitting immigrants and nonimmigrants arriving with U.S. visas at international points of entry, including airports and land borders. USCIS's responsibilities include adjudicating requests for immigration benefits for individuals located within the United States. ICE's responsibilities include enforcing federal immigration law within the interior of the United States. The Executive Orders assign DHS a variety of responsibilities regarding their enforcement.

39. Defendant U.S. Department of State ("DOS") is a cabinet-level department of the United States federal government. DOS is responsible for the issuance

of immigrant and nonimmigrant visas abroad. The Executive Orders assign DOS a variety of responsibilities regarding their enforcement.

40. Defendant Office of the Director of National Intelligence ("ODNI") is an independent agency of the United States federal government. The ODNI has specific responsibilities and obligations with respect to implementation of the Executive Orders.

41. Defendant Rex Tillerson is the Secretary of State and has responsibility for overseeing enforcement and implementation of the Executive Orders by all DOS staff. He is sued in his official capacity.

42. Defendant John Kelly is the Secretary of Homeland Security. Secretary Kelly has responsibility for overseeing enforcement and implementation of the Executive Orders by all DHS staff. He is sued in his official capacity.

43. Defendant Michael Dempsey is the Acting Director of National Intelligence, and has responsibility for overseeing enforcement and implementation of the Executive Orders by all ODNI staff. He is sued in his official capacity.

FACTUAL ALLEGATIONS

President Trump's Expressed Intent To Target Muslims and To Favor Christians Seeking to Enter the Country

44. President Trump has repeatedly made clear his intent to enact policies that exclude Muslims from entering the United States and favor Christians seeking to enter the United States.

45. On December 7, 2015, then-Presidential candidate Trump issued a statement on his campaign website. Entitled, "DONALD J. TRUMP STATEMENT ON PREVENTING MUSLIM IMMIGRATION," the statement declared that "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."

46. The statement, which remains on President Trump's campaign website to this day, invokes stereotypes of Muslims, falsely suggesting that all Muslims believe in "murder against non-believers who won't convert" and "unthinkable acts" against women.

47. Defending his proposed Muslim ban the next day, candidate Trump told Good Morning America, "What I'm doing is I'm calling very simply for a shutdown of Muslims entering the United States—and here's a key—until our country's representatives can figure out what is going on."

48. When asked the same day on MSNBC how his Muslim ban would be applied by customs officials, candidate Trump said, "That would be probably—they would say, are you Muslim?" A reporter followed up by asking, "And if they said yes, they would not be allowed in the country[?]" Candidate Trump responded, "That's correct."

49. Candidate Trump repeatedly reiterated his support for targeting Muslims seeking to enter the United States.

50. On March 9, 2016, candidate Trump stated, "I think Islam hates us. There's . . . a tremendous

hatred there . . . . There's an unbelievable hatred of us . . . . We can't allow people coming into this country who have this hatred of the United States . . . and [of] people that are not Muslim. . . ."

51. The next day, during a debate, candidate Trump said he would "stick with exactly" what he had said the night before. When asked if he was referring to all 1.6 billion Muslims worldwide, he explained, "I mean a lot of them." Candidate Trump stated later in the same debate, "There is tremendous hate. There is tremendous hate. Where large portions of a group of people, Islam, large portions want to use very, very harsh means."

52. On March 22, 2016, candidate Trump stated that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country," adding, "You need surveillance. You have to deal with the mosques whether we like it or not . . . . These attacks aren't . . . done by Swedish people. That I can tell you."

53. The same day, candidate Trump stated on Twitter that a Democratic candidate for President, Hillary Clinton, wanted to "let the Muslims flow in."

54. On June 13, 2016, candidate Trump stated, "I called for a ban after San Bernardino and was met with great scorn and anger. But now many . . . are saying that I was right to do so."

55. In an interview aired on 60 Minutes on July 17, 2016, when asked about the proposed Muslim ban, candidate Trump replied: "Call it whatever you want. We'll call it territories, ok?" Asked again whether

Muslims would be banned, candidate Trump said that "there's nothing like" the Constitution "[b]ut it doesn't necessarily give us the right to commit suicide, as a country, okay?" He again reiterated: "Call it whatever you want."

56. In a July 24, 2016 interview on Meet the Press, candidate Trump was asked if a plan similar to the now-enacted Executive Order was a "rollback" from "[t]he Muslim Ban." Candidate Trump responded: "I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories."

57. Candidate Trump continued: "People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."

58. This explanation that the Muslim ban would use nationality as a proxy was later confirmed by Rudolph Giuliani, an advisor to candidate Trump and later an advisor to him as President. After the Executive Order was signed, Mr. Giuliani explained that "when [candidate Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" In response to this edict, according to Mr. Giuliani, the commission decided to focus on territories, rather than explicitly naming Muslims as the subjects of the ban.

The January 27 Order

59. After conducting a campaign in which a ban on Muslim admissions was a key promise, President Trump

took action to carry out that promise by issuing the January 27 Order one week after being inaugurated.

60. Statements made by President Trump and his advisors around the time of the signing of the January 27 Order confirm President Trump's intent to discriminate against Muslims. In an interview with the Christian Broadcasting Network released the same day that he signed the January 27 Order, President Trump stated that the Order was designed to give Christians priority when applying for refugee status. "If you were a Muslim you could come in [to the United States], but if you were a Christian, it was almost impossible," he said. "[T]hey were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."

61. Consistent with this expressed religious animus towards Muslims and preference for Christians, the January 27 Order disfavors Muslims while giving special treatment to non-Muslims.

62. Section 3, for example, bans any entry for 90 days for individuals from seven countries, each of which is more than ninety percent Muslim: Syria, Sudan, Iraq, Iran, Libya, Somalia, and Yemen.

63. The January 27 Order does not single out any countries for disfavored treatment that are not majority-Muslim.

64. The January 27 Order provides a mechanism for the government to extend and/or expand the 90-day ban at the end of the 90 day period. Sections 3 of the Order directs the Secretary of Homeland Security to "immediately conduct a review to determine the infor-

mation needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat," and to "submit to the President a report on the results of the review . . . within 30 days of the date of this order." At that point, the "Secretary of State shall request all foreign governments that do not supply such information to start providing such information," and 60 days after that—precisely at the end of the initial 90 day ban period—the January 27 Order provides for the President to issue a proclamation indefinitely banning travelers from a list of countries deemed to be non-compliant "until compliance occurs." On information and belief, the 30-day review to be conducted by the Secretary of Homeland Security has not yet resulted in a report to the President.

65. Section 5 of the January 27 Order prohibits refugee admissions for 120 days, except for Syrian refugees, who are banned indefinitely.

66. The January 27 Order discriminates between persons of majority and minority faiths in their country of origin. Section 5(b) requires the government to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality" once the 120-day ban on refugee admissions is complete.

67. During those 120 days, moreover, Section 5(e) allows the admission of certain refugees on a discretionary case-by-case basis, "only so long as [the Secre-

taries of State and Homeland Security] determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution."

68. As the President conceded, these provisions are intended to allow Christian refugees to enter the United States, even while Muslim refugees from the same countries are prohibited from doing so. And indeed, Muslims would be severely disadvantaged under the minority-faith preferences set forth in Sections 5(b) and 5(c). During the past three fiscal years, only 12% of Muslim refugees hailed from a country where Islam is a minority faith.

69. There is no statutory, regulatory, or constitutional basis for favoring refugees from minority faiths over refugees from majority faiths. There is no basis in the Refugee Act of 1980, as amended—which governs the admission of refugees to the United States and their resettlement herein—to prioritize refugees fleeing persecution on the basis of religion, as opposed to the other congressionally-recognized bases. *See* 8 U.S.C. § 1101(a)(42) (defining "refugee").

70. Section 5(d) reduces, by more than half, the annual refugee admissions allotment that was set prior to the current fiscal year by President Obama (reducing from 110,000 to 50,000).

71. Upon information and belief, as of February 2017, approximately 41,000 refugees had already been resettled in the United States. Upon information and belief, the number of refugees already somewhere in

the U.S. Refugee Admissions Program pipeline—well over 50,000—would put the U.S. refugee resettlement total above Section 5(d)'s reduced admissions allotment of 50,000.

72. As a result, upon information and belief, Defendants have already undertaken various actions to bring to a halt the U.S. refugee resettlement process as a result of Section 5(d)'s reduction in this fiscal year's figure.

73. For example, upon information and belief, shortly after the January 27 Order was signed, USCIS, a component of Defendant Department of Homeland Security, cancelled nearly all refugee processing interviews abroad.

74. Additionally, upon information and belief, Defendant Department of State has suspended security checks for refugees, a process that typically takes between 18-24 months.

75. Upon information and belief, Section 5(d)'s reduction in the annual refugee admissions allotment has all but ground to a halt the United States' refugee resettlement process.

76. Furthermore, Section 5(g) seeks to expand the limited role State and local governments have in the refugee resettlement process beyond that envisioned by Congress in order to authorize and facilitate the recently-stated desire and intent of some states and localities in the United States to discriminate against lawfully-admitted refugees on the basis of their nationality and/or religion. *See, e.g.*, *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902 (7th Cir. 2016)

(affirming preliminary injunction on equal protection grounds of state executive order issued by then-Governor of Indiana, Mike Pence, that sought to prevent the resettlement in the State of refugees from Syria).

77. In addition to Sections 3 and 5, other sections of the January 27 Order reinforce stereotypes about Muslims and discriminate against them. Multiple sections, for example, associate Muslims with violence, bigotry, and hatred, inflicting stigmatic and dignitary harms, among other types of injury. These include Sections 1 and 2, which portray the ban as protecting citizens from foreign nationals "who would place violent ideologies over American law" and "who intend to commit terrorist attacks in the United States"; and Section 10, which requires the Secretary of Homeland Security to periodically publish information about the number of "foreign nationals" involved in, among other things, terrorism-related activities, radicalization, and "gender-based violence against women, including honor killings"—direct echoes of thencandidate Trump's broad statements denigrating Islam and Muslims.

78. Further, on information and belief, since the January 27 Order was signed, CBP has questioned foreign nationals entering from certain countries about their religious beliefs to determine whether or not they are Muslim, and has subjected Muslim travelers from countries other than the seven designation nations to disproportionate and unwarranted scrutiny and interrogation.

79. There is no sound basis for concluding that Muslims generally, or Muslims from particular countries, are more likely to commit violent acts of terror.

80. A previous program to track certain foreign nationals predominantly from Muslimmajority countries, the National Security Entry-Exit Registration System ("NSEERS"), did not lead to the conviction or even identification of a single terrorist, even though it subjected tens of thousands of people to additional screening and investigation.

81. Many alternatives exist that do not involve targeting individuals based on their faith or using nationality as a proxy for faith, are less restrictive than the January 27 Order, and are more closely tailored to legitimate national security concerns.

82. The January 27 Order remains in effect until March 16, 2017, when the March 6 Order becomes effective and rescinds and replaces the January 27 Order.

The Chaotic and Irregular Implementation of the January 27 Order

83. The preparation and implementation of the January 27 Order were extremely unusual and chaotic. Upon information and belief, the White House bypassed regular channels for input and cooperation with other components of the Executive Branch, including the Secretaries of Homeland Security, Defense, and State. Moreover, upon information and belief, CBP was not given clear operational guidance during critical times in the implementation of the January 27 Order.

84. The January 27 Order was signed without final review or legal analysis from DHS, which—along with the DOS—is principally charged with implementing the Order.

85. Secretary of Homeland Security Kelly was reportedly in the midst of a conference call to discuss the January 27 Order when someone on the call learned from watching television that the Order they were discussing had been signed.

86. Similarly, Secretary of Defense Mattis, who had publicly criticized President Trump's proposal to ban Muslims from the United States, reportedly did not see a final version of the January 27 Order until the day it was signed and was not consulted during its preparation.

87. The January 27 Order did not arise out of the usual process of consulting with the relevant cabinet-level officials and agencies before issuing an Executive Order. Instead, the January 27 Order was primarily drafted by a small team of Presidential aides, overseen by chief White House strategist Stephen K. Bannon.

88. Mr. Bannon has previously made anti-Muslim comments. He criticized former President George W. Bush for referring to Islam as "a religion of peace," calling President Bush "one of the dumbest presidents in the history of these United States."

89. Congressional staff who worked on the January 27 Order reportedly were required to sign nondisclosure agreements, and not even the members of Congress they served were allowed to know of their work

on the January 27 Order. On information and belief, this arrangement was also highly unusual.

90. During the days leading up to and following the signing of the January 27 Order, its scope and provisions were changed without any rational relationship to the purported reasons for the January Order.

91. For example, the night before the January 27 Order was signed, the Department of Homeland Security issued guidance interpreting § 3(c) of the January 27 Order as not applying to lawful permanent residents. Overnight, the White House overruled that guidance, applying the January 27 Order to lawful permanent residents subject to a case-by-case exception process, in a decision closely associated with Mr. Bannon.

92. After the detention at airports of many individuals, including lawful permanent residents, led to chaos nationwide, Secretary Kelly issued a statement "deem[ing] the entry of lawful permanent residents to be in the national interest." Secretary Kelly's statement was made pursuant to Section 3(g) of the order, which requires such a decision to be made jointly with the Secretary of State and "on a case-by-case basis."

93. Finally, on February 1, the Counsel to the President purported to interpret the January 27 Order as exempting lawful permanent residents from the ban entirely.

94. Similarly, initial guidance from the Department of State indicated that individuals with dual citizenship, with one country of citizenship subject to the ban, would be banned from entering the United States. Word of a change in that policy spread irregularly, with

notice being given to airlines and foreign nations but contradicted in official U.S. government communications.

95. Finally, CBP announced a changed policy, explaining, in response to the question "Does 'from one of the seven countries' mean citizen, national or born in?" that "Travelers are being treated according to the travel document they present." According to this policy, currently in place, the very same individual both is and is not subject to the travel ban depending only on the travel document she presents.

96. The government also reversed itself on its policy toward holders of Special Immigrant Visas from Iraq. Holders of these visas are clearly banned under the terms of the January 27 Order, and they were refused entry when it went into effect. However, on February 2, 2017, the government changed course and allowed them to enter the United States despite the January 27 Order.

97. Still other aspects of the January 27 Order and its implementation demonstrate utter disregard for the individuals affected by it. For example, the Administration knew that the January 27 Order would bar the entry of individuals who were literally mid-air when the order was issued. Nonetheless, and absent any exigency that would justify it, the order was signed late on a Friday afternoon. That decision had a number of predictable consequences, including: making it more difficult for the federal employees tasked with enforcing the order to obtain instruction on how to interpret and enforce the order's sloppily-written provisions; prolonging the detentions at airports of those affected,

and leading many to be wrongfully deported; and increasing the difficulty advocates had in accessing their clients and the courts.

98. In a tweet on January 30, 2017, President Trump appeared to justify the rushed implementation of the January 27 Order by claiming that "[i]f the ban were announced with a one week notice, the 'bad' would rush into our country during that week. A lot of bad 'dudes' out there!"

99. Even once advocates were able to access the courts and obtain temporary injunctive relief against aspects of the Executive Order, DHS officials frequently refused or otherwise failed to comply with the court orders, undermining bedrock constitutional principles and inflicting further unlawful injury on the affected individuals.

100. Other actions taken by DHS and DOS to enforce the January 27 Order exhibit a zealous desire to go beyond even the draconian measures the order actually requires.

101. Notwithstanding that Section 3 of the January 27 Order only bars "entry into the United States of aliens from" one of the aforementioned seven Muslim-majority countries, DHS interpreted it to prohibit the granting of *any* immigration-related benefit to anyone from those countries—including to individuals who are already in the United States. That decision would have wide-ranging consequences, including: delaying naturalization of lawful permanent residents ("LPRs") from those countries who wish to become U.S. citizens; rendering asylees from those countries unable to be

lawfully employed once their Employment Authorization Documents expire; and either expelling or making undocumented any individuals here on nonimmigrant visas (including student, employment, and tourist) that otherwise would have been renewed.

102. DOS, at the request of DHS, issued a letter purporting to provisionally revoke *all* immigrant and nonimmigrant visas of nationals of the seven designated countries on a categorical basis. The letter is dated January 27, 2017, but only came to light on January 31, 2017, when Department of Justice lawyers filed it in pending litigation. DOS has stated that this action was taken to "implement[]" the Executive Order.

103. Upon information and belief, DOS has never before revoked a broad swath of valid visas in this manner. Nor, on information and belief, is visa revocation ordinarily undertaken in secret, with no notice to the visa holder and no individualized consideration of whether any particular visa should be revoked.

104. Still further evidence of discriminatory intent and effect is reflected in the statements by President Trump and his Administration seeking to defend and justify the January 27 Order after it was issued.

105. President Trump, for example, falsely stated that only 109 people were detained over the weekend following the issuance of the January 27 Order, even though he knew or should have known that the number was far higher.

106. Indeed, pursuant to a federal district court order, the federal government has since revealed that at least 746 individuals were detained over a period of

just 27 hours during the weekend after the January 27 Order was signed. This 27-hour period did not begin until a day after the January 27 Order went into effect.

107. These chaotic, irregular, and irrational policies, policy changes, and statements indicate that the purported justifications for the January 27 Order are pretextual and that it was at least substantially motivated by an intent to discriminate against Muslims.

The Nationwide Preliminary Injunction Enjoining the January 27 Order

108. A February 3, 2017, order issued by the District Court for the Western District of Washington currently prohibits the government from enforcing Sections 3(c), 5(a), 5(b), and 5(e) of the January 27 Order. Upon issuance of this Order, which the District Court described as a temporary restraining order, the government appealed to the Ninth Circuit and sought a stay pending appeal.

109. After hearing oral argument, the Ninth Circuit declined to stay the Order, noting that "although courts owe considerable deference with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).

110. In reaching its holding, the Court noted that "[t]he government has pointed to no evidence that any alien from any of the countries named in the order has perpetrated a terrorist attack in the United States." *Id.* at 1168.

111. The Court also acknowledged "evidence of numerous statements by the President about his intent to implement a 'Muslim ban'" and observed that "[i]t is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Id.* at 1167.

112. The Court also found that the February 3 Order, although styled a TRO, should be treated as a preliminary injunction.

113. Shortly after the Ninth Circuit's opinion issued, President Trump tweeted, "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!" He subsequently denounced the opinion as "a political decision" and stated, "[W]e're going to see them in court, and I look forward to doing that. It's a decision that we'll win, in my opinion, very easily."

114. On March 7, 2017, the government withdrew its appeal of the February 3 Order, leaving in place the preliminary injunction of Sections 3(c), 5(a), 5(b), and 5(e) of the January 27 Order.

The March 6 Order

115. In the weeks preceding the issuance of the March 6 Order, Stephen Miller, a senior advisor to President Trump, explained that the administration was preparing a new executive order "to be responsive to the judicial ruling" of the Ninth Circuit. He explained that the changes would be "mostly minor, technical differences. Fundamentally, you are still going to have the same, basic policy outcome for the country."

116. Consistent with Mr. Miller's statement, the March 6 Order, explicitly referring to the Ninth Circuit's ruling, exempts certain categories of noncitizens that have "prompted judicial concerns" from the ban, and alters the original order's "approach to certain other issues or categories of affected aliens" "in order to avoid spending additional time pursuing litigation" over the constitutionality of the January 27 Order.

117. Indeed, notwithstanding an expanded "Policy and Purpose" section and certain other changes discussed more fully below, the March 6 Order is extremely similar to the January 27 Order in most important respects.

118. Like the January 27 Order, the March 6 Order bans entry for a new 90 day period for individuals from the six of the same seven predominantly Muslim countries identified in the January 27 Order: Syria, Sudan, Iran, Libya, Somalia, and Yemen (Section 2(c)).

119. Like the January 27 Order, the March 6 Order also provides a mechanism for the government to extend and/or expand the 90-day ban at the end of the 90 day period. Section 2 of the Order directs the Secretary of Homeland Security to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." In addition, the March 6 Order explicitly provides that the review need not be conducted in a consistent matter between countries: "The Secretary of Homeland Security may

conclude that certain information is needed from particular countries even if it is not needed from every country." Again, the order provides for the submission of a report on this review within 30 days of the date of the order, a period (50 days rather than 60) for countries to respond to the order, and a provision for the President to thereafter issue a proclamation indefinitely banning travelers from a list of countries deemed to be non-compliant.

120. The corresponding provisions of the January 27 Order were never suspended and remain in effect.

121. The country-by-country report required by the January 27, 2017 Order was due on February 26, 2017, eight days before the March 6 Order was issued. On information and belief, this report was not produced.

122. The March 6 Order states that "Iraq presents a special case" because of the "close cooperative relationship between the United States and the democratically elected Iraqi government" and because the "Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal" (Section 4). With this justification, the March 6 Order exempts foreign nationals of Iraq from the categorical ban on entry applicable to other countries originally targeted by the January 27 Order. Instead, Iraqis are subject to "thorough review" and "consideration of whether the applicant has connections with ISIS or other terrorist organizations."

123. Like the January 27 Order, the March 6 Order allows for waivers to this ban on a discretionary case-by-case basis (Section 3(c)). In contrast to the January 27 Order, which simply stated that visas and other immigration benefits may be issued "when in the national interest," the March 6 Order provides nine examples of situations in which a waiver would be appropriate, such as when "the foreign national is an infant, a young child or adoptee" or "an individual needing urgent medical care" (Sections 3(c)(i)-(ix)). These and other similar circumstances enumerated in the March 6 Order reflect specific examples of individuals whose denial of entry pursuant to the January 27 Order resulted in the filing of lawsuits and widespread public outcry.

124. The March 6 Order also contains exceptions to this ban for, among others, lawful permanent residents and dual nationals traveling on passports issued by a non-designated country (Section 3(b)).

125. Like the January 27 Order, the March 6 Order cuts the number of refugees admissible to the United States for fiscal year 2017 from 110,000 to 50,000 and prohibits refugee admissions for 120 days, with an exception for discretionary case-by-case admissions (Sections 6(a), 6(b)). The March 6 Order also expressly suspends decisions on applications for refugee status for 120 days (Section 6(a)).

126. Defendant Department of State has informed Plaintiff HIAS that only refugees who are already booked for travel to the United States arriving at their port of entry through the end of March 15, 2017, i.e., before the March 6 Order's effective date of March 16,

2017 at 12:01 am, will be permitted to enter the United States. Defendant Department of State has indicated that no further bookings may be made.

127. Defendant Department of State has informed Plaintiff HIAS that all DHS screening interviews will continue to be suspended until further notice, unless exceptions are arranged on an individual basis.

128. Defendant Department of State has informed Plaintiff HIAS that no new Interagency Checks (IAC) and Security Advisory Opinion (SAC) security checks may be requested. Upon information and belief, all refugees must undergo both IAC and SAO security checks before traveling and being admitted to the US.

129. In addition to the provisions discussed above, the March 6 Order contains nearverbatim reproductions of all the other substantive provisions of the January 27 Order, including:

- Former Section 4(a), now Section 5(a), which requires the Secretaries of State and Homeland Security, the Attorney General, and the Director of National Intelligence to implement uniform screening standards to identify individuals "who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry."
- Former Section 5(g), now Section 6(d), which seeks to expand the limited role State and local governments have in the refugee resettlement process, potentially facilitating the stated desire

and intent of some states and localities in the United States to discriminate against lawfully-admitted refugees on the basis of their nationality and/or religion. *See, e.g.*, *Exodus Refugee Immigration*, 838 F.3d 902.

- Former Section 6, now Section 7, which directs the Secretaries of State and Homeland Security to consider rescinding certain waivers of terrorism-related inadmissibility grounds ("TRIG waivers") authorized by previous administrations. TRIG waivers have historically been used to facilitate the admission to the United States of certain individuals or groups of individuals—often refugees fleeing persecution—who have been forced to give aid to terrorist organizations under duress.
- Former Section 8, now Section 9, which suspends the Visa Interview Waiver Program.
- Former Section 10, now Section 11, which requires the Secretary of Homeland Security to periodically publish information about the number of "foreign nationals" involved in, among other things, terrorism-related activities, radicalization, and "gender-based violence against women, including so-called 'honor killings.'"

130. The signing and implementation of the March 6 Order was reportedly delayed because of the positive media reviews President Trump received after his address to a joint session of Congress on February 28, 2017. Although the Trump Administration had previously intended on releasing the revised executive

order the following day, on March 1, 2017, White House officials stated that they delayed the release of the revised Executive Order so that President Trump's speech could continue to receive positive press attention.

131. Upon information and belief, the delay following President Trump's congressional address marked the third time the administration put off the issuance of the revised Executive Order.

132. Before signing the March 6 Order, President Trump ordered the Department of Homeland Security and the Department of Justice to produce an intelligence report to demonstrate that the seven Muslim-majority countries originally identified in the January 27 Order present a substantial security threat and have exported terrorism to the United States.

133. Upon information and belief, such an attempt to reverse-engineer a national security justification for an executive action is not common practice.

134. In response, analysts at the Department of Homeland Security prepared a draft report, released to the press on February 24, 2017, indicating that there was insufficient evidence that the nationals of the seven Muslim-majority countries included in in the January 27 Order pose a terror threat to the United States.

135. The draft report found that citizenship is an "unlikely indicator" of terrorism threats to the United States, and that few people from the countries identified in the January 27 Order have carried out attacks or been involved in terrorism-related activities in the United States since Syria's civil war started in 2011.

136. A second Department of Homeland Security report, dated March 1, 2017, found that of the limited number of the foreign-born, U.S.-based violent extremists, most become radicalized after living in the U.S. for a number of years.

137. The Executive Order does not acknowledge or rely on either of these recent, specific security appraisals from the Department of Homeland Security. Instead, it relies on the State Department's Country Reports on Terrorism 2015 (June 2016). In relying on those reports, however, the Order disregards other countries that the State Department describes as safe havens for terrorists, and that pose a similar if not larger threat. For example, the State Department noted in its 2015 chapter on Terrorist Safe Havens that Venezuela has become a haven for terrorist groups, explaining that the country's "porous border with Colombia has made [it] attractive to the Revolutionary Armed Forces of Colombia and the National Liberation Army." Similarly, the State Department concluded that "[t]here are ungoverned, under-governed, and ill-governed areas of Mali that terrorist groups have used to organize, plan, raise funds, communicate, recruit, train and operative in relative security."

138. The Secretary of Homeland Security also said in an interview that many other countries not banned in the Executive Order raise similar security concerns. "There's probably thirteen or fourteen other countries —not all of them Muslim countries, not all of them in the Middle East—that have very questionable vetting procedures that we can rely on."

139. The Order also states that "more than 300 persons who entered the United States as refugees are currently subjects of counterterrorism investigations by the Federal Bureau of Investigation." The Order does not note that very few F.B.I. initial assessments of terrorism threats become intensive investigations: for example, in the four months from December 2008 to March 2009, the F.B.I. began 11,667 "assessments" related to terrorism, only 427 of which—less than 4%—led to more intensive investigations.

140. Over 970,000 individuals have been admitted to the United States as refugees between 2001 and the present.

141. The March 6 Order was motivated by the same anti-Muslim purpose that motivated the January 27 Order. In replicating much of the substance of the January 27 Order, the March 6 Order seeks to prevent the entry of Muslims into the United States and reinforces stereotypes about Muslims by associating them with terrorism, violence, bigotry, and hatred. .

142. White House spokesperson Sean Spicer echoed these comments on March 6, explaining, after President Trump signed the revised Order, "The principles of the executive order remain the same."

The Grave Harm to Plaintiffs and Their Clients

143. Implementation and enforcement of the January 27 Order has already caused Plaintiffs and their clients substantial, concrete, and particularized injury. Implementation of the March 6 Order threatens them with continued irreparable harm if not permanently enjoined.

144. Both Executive Orders suspend refugee resettlement and intentionally discriminate against Muslims. Both Executive Orders therefore frustrate IRAP's mission and impose a significant burden on IRAP's work. As a direct result of the imposition and enforcement of the January 27 Order, IRAP and its clients have suffered substantial, concrete injuries. Because the March 6 Order is substantively the same, these injuries will continue once the March 6 Order takes effect.

145. IRAP serves refugees and displaced persons of all faiths, but the vast majority of its clients are Muslim. IRAP counsels persecuted individuals on various legal avenues to safe countries and represents them throughout these processes, with a majority of its clients resettling in the United States.

146. The January 27 Order has already severely restricted IRAP's ability to carry out its work and mission. In the ten days immediately following the issuance of the January 27 Order, IRAP provided assistance to more than forty individuals from Iraq, Iran, Sudan, Libya, Syria, Somalia, and Yemen who, despite being vetted and given permission to enter the United States, had been prevented by the Order from doing so.

147. Of IRAP's 599 open cases, 402 families are from Syria, Iran, Sudan, Somalia, Libya, or Yemen or are refugees from other countries and therefore potentially affected by the new March 6 Order. IRAP has already used a significant portion of its financial resources and time to represent these 402 families through legal adjudications and to provide counseling through the demanding vetting process. Restricting

issuance of visas wastes that investment of resources and time.

148. Furthermore, the March 6 Order will create a significant backlog in the U.S. Refugee Admissions Program, delaying the processing of many of IRAP's clients' cases. This delay forces IRAP to exhaust more of its resources, as the average lifespan of a case now grows significantly.

149. IRAP attorneys are not providing only limited representation in certain new cases, which, prior to the Executive Order would have received full representation, as a result of the exorbitant delays in USRAP processing that the Executive Order will cause.

150. IRAP relies on volunteers from its law school chapters and pro bono firms to meet the needs of their vast client base. With the increased demands of their caseload resulting from the Executive Order, IRAP now has very limited capacity to open new law school chapters or begin new relationships with law firms to place cases for direct representation.

151. Under the Executive Order's freeze of the USRAP, IRAP may also be unable to place new cases with existing chapters or law firms because there is no movement on any refugee cases. IRAP risks losing hundreds of volunteers, and relationships with numerous law firms, because they are unable to provide them with a way to partner with them on cases.

152. IRAP's law firm partners also provide financial support to IRAP. If IRAP no longer has cases to place at law firms, and thus have to decrease our num-

ber of law firm partners, it will significantly cut into the corporate funding IRAP receives.

153. As a result of the Executive Order, IRAP's Resettlement Deployment Scheme with UNHCR, which allows IRAP resettlement experts since early 2016 to be deployed to UNHCR for assisting with their resettlement operations, may be terminated due to the drastic decrease in resettlement slots available in the United States and worldwide. This would lead to the termination of three IRAP staff as well as a revenue loss of approximately $260,000.

154. The delay also endangers the lives of IRAP's clients, because the longer it takes for their cases to be decided, the longer they are in life-threatening environments. In addition, some of the IRAP clients abroad have family ties to IRAP clients already in the United States, and those U.S. clients are suffering harm as a result of the ongoing delay in reunification with their family members, as well as the risk that their family members may suffer persecution or death in the meantime.

155. Both the January 27 Order and the March 6 Order, moreover, marginalize IRAP's Muslim clients, subject them to suspicion, scrutiny, and social isolation on the basis of religion and national origin, and inflict stigmatic and dignitary injuries. IRAP clients who are already inside the U.S. are afraid and fear they are not welcome. Some IRAP clients have been subjected to harassment by law enforcement agencies allegedly conducting "new" security checks. Others have been detained at airports, or rejected from flights multiple times even though they are presenting valid visas.

156. Both the January 27 Order and the March 6 Order, furthermore, have forced IRAP to devote substantial resources to addressing the order's effects on IRAP's clients and those similarly situated. Following the signing of the January 27 Order on January 27, 2017 at 4:42 P.M. EST, two IRAP clients, Mr. Hameed Khalid Darweesh and Mr. Haider Sameer Abdulkhaleq Alshawi, were detained at John F. Kennedy Airport ("JFK") despite having valid entry documents. As a result, IRAP attorneys were present at JFK from 2 am to 6:30 pm on January 28, 2017 attempting to secure their lawful release. Furthermore, together with co-counsel, IRAP filed a habeas petition on behalf of those two clients, together with a motion for class certification (*Darweesh et al. v. Trump et al.*, No. 1:17-cv-480 (E.D.N.Y. filed Jan. 28, 2017)). That litigation is ongoing. These actions are not in the scope of normal IRAP legal assistance, as previous IRAP clients were allowed to enter at U.S. Ports of Entry after receiving final approval to travel.

157. Both the January 27 Order and the March 6 Order have further caused IRAP to divert its resources as IRAP has become the focal point organization for volunteer attorneys all across the country who have gone to airports to attempt to secure the release of individuals detained pursuant to both Executive Orders. In addition to being the first organization to put out a call to volunteer attorneys, IRAP created and maintains a unique hotline email address (airport@refugeerights.org) to advise attorneys and affected individuals. Since the creation of this email address on January 28, 2017, IRAP has received and

responded to over a thousand email messages. IRAP has also developed templates and informational materials for attorneys, affected family members in the United States, and individuals overseas who have been denied travel pursuant to the Order.

158. IRAP also provides safe housing for clients whose lives are in immediate danger while they await the outcomes of USRAP. Clients in urgent situations who face additional four-month delays on their applications (at a minimum) will require IRAP to expend significant funding to ensure continued safe housing.

159. HIAS and its clients have likewise been significantly harmed by the January 27 and March 6 Orders. HIAS's refugee resettlement work is grounded in, and an expression of, the organization's sincere Jewish beliefs. The Torah, Judaism's central and most holy text, commands followers to welcome, love, and protect the stranger. The Jewish obligation to the stranger is repeated throughout the Torah, more than any other teaching or commandment. HIAS believes that this religious commandment demands concern for and protection of persecuted people of all faiths. The Torah also teaches that the Jewish people are to welcome, protect, and love the stranger because "we were strangers in the land of Egypt" (Leviticus 19:34). Throughout their history, violence and persecution have made the Jewish people a refugee people. Thus, both history and values lead HIAS to welcome refugees in need of protection. A refusal to aid persecuted people of any one faith, because of stigma attached to that faith, violates HIAS's deeply held religious convictions.

160. Like the January 27 Order, the March 6 Order severely impedes HIAS's religious mission and work by intentionally discriminating against Muslims and prohibiting the entry of all refugees into the United States for 120 days.

161. Before the January 27 and March 6 Orders were signed, arrangements had been made for many of HIAS's refugee clients to arrive in the United State in January, February, and the coming months. Despite having been previously vetted and granted refugee status, however, clients from Iran, Sudan, Somalia, Ukraine, Bhutan, the Democratic Republic of Congo, Afghanistan, Eritrea, Tanzania, Ethiopia, Uganda, Russia, Belarus, and Burma were delayed in or prevented from entering the country because of the January 27 Order. If the Temporary Restraining Order barring enforcement of the January 27 Order is lifted, or if the March 6 Order goes into effect, HIAS's clients will continue to face significant delays or be denied entry into the United States altogether.

162. Specifically, HIAS has identified nearly 1,400 clients worldwide who were allocated through the Department of State process, have been vetted, and have been approved for refugee status. These refugees have already been allocated and assured to one of HIAS's resettlement sites. Of these clients, less than 60 have been scheduled for travel following the signing of the March 6 Order. That means that any travel for the remaining approved refugees will be significantly delayed, and many will be unable to come at all in this Fiscal Year.

163. Under the Executive Order, the earliest that refugee resettlement could resume would be early July 2017. This would leave Resettlement Agencies, at most, with only two-and-a-half months before the end of the fiscal year to resettle hundreds or thousands of refugees who were supposed to be resettled over a much longer period of time. Refugee processing would be impacted by the 120-day ban since security checks and processing would be suspended during that time. Because security and medical clearances have expiration dates, it is likely that some refugees would lose their readiness for travel during the suspension period and lengthy checks would need to be repeated.

164. In addition, after the January 27 Order was issued, the U.S. Department of State notified HIAS that its resettlement commitment will be cut by 39 percent for the remainder of FFY 2017 due to the Order's drastic reduction in the planned level of refugee admission from 110,000 to 50,000. Thus, some of HIAS's clients who have been vetted and approved as refugees will simply not be able to enter the country in FFY 2017.

165. Of the nearly 1,400 HIAS clients worldwide who were allocated through the Department of State process, have been vetted, and have been approved for refugee status, 500 are nationals of one of the six banned countries. The overwhelmingly majority of these individuals are Muslim. Because they are national of the six banned countries, they will likely be ineligible for the case-by-case exception to the 120-day ban on for refugee applicants set forth in Section 6(c) of the March 6 Executive Order.

166. Every day that HIAS clients' entry is delayed, they remain in precarious situations.

167. Many of HIAS's clients abroad, whose refugee status has been approved but have yet to be scheduled for travel, including clients from the six banned countries, have family members in the United States, also HIAS clients, who will suffer as a result of the delay in reuniting with their family members. Some of these U.S. ties are, in fact, individuals who petitioned for refugee status (often through HIAS) for their family members.

168. In addition, more than 1,300 refugee applications initiated through HIAS by family members residing in the United States remain pending for HIAS clients abroad. The adjudication of these applications has been or will be substantially delayed because of the March 6 Order. In fact, since the Orders were signed, consideration of most refugee applicant cases in need of security checks have been suspended. This means that, for many refugees in the pipeline, security checks that typically lasted 18-24 months will now be paused and restarted, potentially adding years to their wait for stable resettlement. The delay in processing of these applications will subject these clients to further risk of persecution and abuse in their current situations, and their family members who petitioned for them to come to the United States will remain in limbo as to whether they will ever be reunited.

169. The Executive Orders convey an official message of disapproval and hostility toward HIAS's Muslim clients, making clear that the government deems them outsiders, not full members of the political com-

munity. HIAS's Muslim clients in the United States have been marginalized as a result of this anti-Muslim message, have been subjected to baseless suspicion, scrutiny, and social and political isolation on the basis of religion and national origin, and have suffered other dignitary and stigmatic injuries.

170. Additionally, as a result of the January 27 Order, at least one of HIAS's Muslim clients in the United States was detained at an airport for an extended period, handcuffed and separated from his family, and many other clients have otherwise had their travel significantly delayed.

171. Because HIAS is a non-profit resettlement organization that has a cooperative agreement with the federal government on a per-capita basis for each refugee served, and because the Department of State asked HIAS to increase its capacity from the 3,884 refugees resettled in federal fiscal year ("FFY") 2016 to 4,794 refugees in FFY 2017, HIAS would be denied crucial funding as a result of the March 6 Order, which bans all refugees for 120 days, bars all entry for the six Muslim-majority countries for 90 days, and limits the number of refugees to be admitted in the current fiscal year at 50,000, which is less than half the number the Department of State told the resettlement agencies to collectively plan to resettle.

172. After the January 27 Order was issued, the U.S. State Department notified HIAS that its resettlement obligation for FFY 2017 would be slashed from nearly 4,800 to just over 2900 refugees. The financial losses to HIAS and its affiliate network—up to $2.2 million—will be crippling, especially for many of HIAS's

affiliates, which are heavily dependent on funding that flows through HIAS. These losses will translate to irreparable harm to HIAS, its affiliates, and its clients because they will cause (and have already caused) a substantial reduction in program services and closure of resettlement sites. When this happens, the local expertise, relationships, and good will—developed by affiliate staff, often over years and years—are lost entirely or substantially diminished. Building a new resettlement site can take months or years of relationship-building, including cooperation with local government and elected officials, businesses who would be potential employers, landlords, volunteers, and the refugee communities themselves. In addition, fewer resettlement sites may limit the type of specialized assistance and services (e.g., for LGBT refugees) that clients can receive.

173. The January 27 and March 6 Orders would also result in the waste of HIAS resources. For example, in the past year, HIAS has devoted substantial private resources to developing a program with several congregations in Westchester, New York, to welcome Syrian refugee families. Because of the 90-day and 120-day bans, as well as the unexpected and dramatic lowering of the refugee admissions level, both the January 27 Order and the March 6 Order would put those resources to waste. Congregations and family members of HIAS clients have extended resources to prepare for anticipated refugees, by renting apartments and purchasing furnishings. In addition, some refugees who were anticipating resettlement through HIAS left jobs or travelled through other countries and now

face precarious situations as a direct result of the January 27 Order and March 6 Order.

174. In the weeks and months prior to the order, HIAS concluded a formal plan with the Department of State to increase HIAS's national resettlement capacity by 23.4% from 3,884 refugees in federal fiscal year 2016 to 4,794 refugees in federal fiscal year 2017. This plan caused HIAS to invest substantial resources into expanding existing resettlement sites and opening new refugee resettlement sites in Wisconsin, Delaware, New York, Illinois, and Massachusetts, as approved by the Department of State. These resources will be wasted, at least in part, because of the January 27 Order and the March 6 Order.

175. In addition, HIAS has been forced to divert substantial resources, and will continue to to do so, to dealing with the fallout from both executive orders and their effect on HIAS's clients, including devoting staff time to working with clients, and their families in the United States, who were denied entry and face precarious situations overseas.

176. Plaintiff MESA and its members will also be harmed by the March 6 Order. MESA has members from the six designated countries who are outside the United States and lack U.S. visas. Because of the March 6 Order, these members will not be able to travel to the United States to attend academic conferences, including an annual meeting sponsored by MESA. Participation in academic conferences is crucial to the professional success of both graduate students and professors, and to their ability to fully engage with the ideas and scholarship of the broader Middle Eastern

studies community. Many important conferences, including the MESA annual meeting, take place in the United States

177. Graduate students who are MESA members or are studying under MESA members in the United States often leave the country to complete field work for advanced degrees. Because of the Executive Order, many such students from the six designated countries fear exclusion from the United States if they leave the country. The inability to leave the United States with an assurance they will be permitted to reenter will impair their ability to engage in research and participate in academic conferences. Such students will also lose their ability to visit family and friends abroad with an assurance they will be permitted to reenter. For example, Iranian students affiliated with MESA have cancelled plans to return home for Persian New Year, an important holiday that will occur on March 21, because of the Executive Order.

178. MESA members who are U.S.-based faculty will be impacted by the Executive Order because potential students from the designated countries will be unable to obtain visas to study with them in the United States. Similarly, their current U.S.-based students from the designated countries will not be able to travel abroad for field work with an assurance they will be permitted to reenter, impacting faculty members' ability to facilitate quality research and educational opportunities. Likewise, U.S.-based MESA faculty members will forego opportunities to travel abroad for research and academic conferences for fear that they will not be readmitted, or will be subjected to

harassment or discrimination upon application for reentry to the United States. MESA members will also be precluded from traveling to the designated countries for research or academic conferences when those countries institute reciprocal actions in response to the Executive Order, as Iran has done.

179. A large number of MESA members are Muslim or are institutional members whose officers, employees, or members are Muslim. The Executive Orders convey an official message of disapproval and hostility toward these Muslim members, making clear that the government deems them outsiders, not full members of the political community. This marginalizes them, subjects them to suspicion, scrutiny, and social and political isolation on the basis of religion and national origin, and inflicts other stigmatic and dignitary injuries.

180. MESA itself will also be harmed by the Executive Order. As part of its goal to advance learning, facilitate communication, and promote cooperation, MESA sponsors an annual meeting that is a leading international forum for scholarship, intellectual exchange, and pedagogical innovation. Approximately thirty percent of MESA members are based outside of the United States and must travel to the United States to attend MESA's annual conference. At least 46 citizens of the six designated countries traveled to the United States to attend the last annual meeting. MESA expects that a substantial number of scholars will be unable to attend this year's meeting because of the restrictions imposed by the Executive Order. Moreover, in part because of the stigmatic message of the Executive Order, many members based in Europe and the Middle

East are likely to heed international calls to boycott academic conferences in the United States in protest of the Executive Order, including the MESA annual conference. The absence of these scholars, attributable to the Executive Order, will have a substantial negative effect on the meeting. These and other impacts of the Executive Order will negatively impact MESA's mission of fostering the study and public understanding of the Middle East.

181. In addition, the Executive Order will cause serious financial harms to MESA. A large portion of MESA's annual budget is funded through annual membership dues and registration fees to attend the annual meeting. For each individual who cannot or will not attend the annual meeting, MESA will lose $90-250 in registration fees. MESA will also suffer other financial injuries related to its annual meeting as a result of the executive order. Some individuals who cannot or will not attend the meeting will allow their MESA membership to lapse as a result. For each such lapsed membership, MESA will lose $25-300 in membership dues.

182. Plaintiff John Doe #1, a lawful permanent resident, has suffered and will continue to suffer harm because of the Executive Order. In August 2016, while John Doe #1's application to become a lawful permanent resident was pending, he married an Iranian national who lives in Iran. She applied for a visa as John Doe #1's dependent and her application was approved on November 3, 2016. As of January 9, 2017 John Doe #1 and his wife had submitted all of the requisite documentation and paid immigrant visa processing

fees, and were waiting for notification that an interview was scheduled. At the time the Executive Order went into effect, John Doe #1 expected his wife's interview to be scheduled within no more than six weeks based on information published by the National Visa Center. Under the Executive Order, John Doe #1's wife will not be interviewed or granted a visa.

183. The Executive Order's travel ban on Iranian nationals has created significant fear, anxiety and insecurity for John Doe #1 and his wife regarding their future. After her mother's unexpected death in 2013, John Doe #1's wife has been alone in Tehran. The Executive Order's ban forces John Doe to choose between his career and being together with his wife, who remains in Tehran.

184. Plaintiff John Doe #3, a lawful permanent resident, has suffered and will continue to suffer harm because of the Executive Order. John Doe #3 recently applied to become a naturalized citizen, and that petition remains pending with USCIS.

185. In the summer of 2014, John Doe #3 married a national of Iran. In October 2014, John Doe #3 applied for an immigration visa on her behalf. Approximately 19 months later, in May 2016, she had her interview at the U.S. Embassy. At that time, she was informed that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join her husband in two to three months. She therefore resigned from her job and began preparing to join her husband in the United States. The Executive Order, however, puts the couple's plans in peril, as it has at least delayed, and could prevent,

John Doe #3's wife from obtaining her visa and joining her husband in United States.

186. Since moving to the United States, John Doe #3 has returned to Iran on several occasions to visit his wife, but is now fearful of leaving the United States. He had planned to visit her in February 2017, but put his plans on hold in light of the Executive Order. John Doe #3 is afraid that if he leaves the United States to see his wife, he will not be permitted to reenter the United States or could be detained by immigration officials at the airport upon his return. As a result, if John Doe #3 must leave the United States to visit Iran for an urgent family member, he feels he must make plans for his apartment, car, savings account, and other aspects of his personal life in the United States in order to prepare for the possibility that he may not be allowed to return.

187. Their continued separation has placed extraordinary stress on John Doe #3 and his wife, and their relationship. John Doe #3 and his wife are young and feel as though they've been unable to start their lives together because of the delays and uncertainty caused by the Executive Order.

188. Plaintif Jane Doe #2, a U.S. citizen, has suffered and will continue to suffer harm because of the Executive Order. She is enrolled in a local college where she is studying to become a healthcare technician. She filed a family-based visa petition for her sister who is a Syrian refugee currently living in Saudi Arabia on the border with Yemen. The petition is currently pending a decision. Approval of the petition

would allow Jane Doe #2's sister to access the U.S. Refugee Admissions Program (USRAP).

189. Jane Doe #2's sister, who is Muslim, was born in Damascus, Syria, where she grew up and spent most of her life. She worked as a French teacher and her husband was a sales manager at a local business. They have two young children. In 2012, continuous bombing of her neighborhood forced her and her family to move to her parent-in-laws with nothing more than their passports and the clothes on their backs. The bombing of her neighborhood continued and she was never able to re-enter her home.

190. While internally displaced in Syria, Jane Doe #2's sister and husband learned that the Syrian government's selective service might be expanded to include men over the age of 30, which would include her husband. After some of her husband's friends were conscripted for the selective service, they determined that he should flee immediately to Yemen. Because Jane Doe #2's sister was a government employee, she was required to apply for government approval before stopping work and could not flee with him immediately. As a result, she and her oldest child remained in Syria —at the time she was pregnant with their youngst child. When, in 2013, she finally received government approval to discontinue work, she and her child fled to join her husband in Yemen. In Yemen, she registered with the U.N High Commissioner for Refugees, which provided her with a temporary protection certificate explaining that she should be protected from forcible return to Syria.

191. As a result of the war in Yemen, Jane Doe #2's sister and her family had to flee again, this time to Saudi Arabia, where they now live in a refugee hotel close to the border of Yemen. They remain under constant threat from nearby rocket file and military conflict. The shelling where they currently live is so constant that the local school is only open one to two days per week, if at all. Jane Doe #2's children are unable to go to school and are receiving no formal education.

192. The building where Jane Doe #2's family is living is infested with bugs and human refuse from the bathroom in the unit above theirs leaks into their room. Jane Doe #2 and her family, are constantly sick and her children regularly vomit. The Saudi Arabian government is also regularly turning off the power to the building there they live with other refugees in order to make life so intolerable that they will leave.

193. Jane Doe #2's sister and her family also face sever discrimination in Saudi Arabia on account of their status as Syrian refugees. Her husband has had a very difficult time finding work and even when he can work, he is often cheated out of his wages and otherwise exploited. Jane Doe #2's sister is unable to leave the apartment where they are staying in the daytime because without being accompanied by her husband, the risk that she would be abducted as a Syrian refugee woman is too high. As a result, her children did not believe that the sun rose and set in Saudi Arabia because the room that they are staying in does not have any windows and they only left the room at night when Jane Doe #2's husband could accompany them.

194. As Syrian refugees, Jane Doe #2's sister and her family are eligible and qualify for the Priority-2 Direct Access Program for Iraqi and Syrian Beneficiaries of Form I-130 Petition for Alien Relatives. If the Executive Order remains in effect, Jane Doe #2's sister will not be interviewed or granted a visa. Moreover, she will have little chance of traveling to the United States as a refugee given the suspension of USRAP, the high likelihood that Syrian refugees will continued to be barred from entry to the United States, and the lowered refugee admissions cap of 50,000.

195. Plaintiff Meteab, a lawful permanent resident, has also suffered and will continue to suffer harm because of the Executive Order. After the U.S. invasion of Iraq in 2003, Mr. Meteab and his four brothers all cooperated with the U.S. military in helping to establish the transitional government, in the wake of the conflict in Najaf, Iraq. Because of their cooperation with the U.S. government, they were targeted and threatened by armed militia groups in Iraq.

196. Mr. Meteab is a SunniMuslim, as are his brothers. In Iraq, they lived together in a Shi'a neighborhood. In 2013, Mr. Meteab and his family were warned by neighbors and community members that if they failed to leave the area, their family would be killed. In 2013, Mr. Meteab's nephew Mosad was shot in the leg. After this, on December 25, 2013, Plaintiff Meteab's older brother fled to Jordan with his children and two of his nephews, including Mosad. Plaintiff Meteab and his wife and children joined them in Jordan on January 5, 2014. Plaintiff Meteab's three other brothers also fled to Jordan in 2014. All of them applied

for and received recognition as refugees from the United Nations High Commission for Refugees.

197. In August 2015, after being approved as a refugee, Plaintiff Meteab came to the United States with his wife and children. His three other brothers, Ali, Abdulateef, and Ahmed, have been approved as refugees but remain in Jordan awaiting resettlement,. Abdulateef was approved for resettlement in Canada but is awaiting final clearance. Mr. Meteab's brothers Ali and Ahmed, were approved for resettlement in the United States.

198. In November 2016, Plaintiff Meteab's brothers Ali and Ahmed were told by the International Organization for Migration that while their refugee applications had been approved, they still did not have travel documents to come to the United States. Jewish Family Services notified Plaintiff Meteab's family of this update at the same time. When Mr. Meteab's brothers learned about the Executive Order from the news in January 2017, they realized the travel ban would prevent them from joining him in the United States.

199. Since the January 27th Executive Order was released, Mr. Meteab and his wife have experienced anti-Muslim sentiment and felt very uncomfortable and insecure in their community, causing them acute mental stress. They have experienced hostility in public, with people staring at Mr. Meteab's wife, who wears a hijab, and refusing to stop for them at crosswalks. Their nieces, who also came to the United States as refugees, have been harassed in school.

200. Plaintiff Harrison has suffered and will continue to suffer harm as a result of the Executive Order. Mr. Harrison is a citizen of the United States and lives in Euless, Texas. His fiancé is a citizen and resident of Iran and is Muslim. They have been together since November 2015.

201. In March 2016, Plaintiff Harrison petitioned for a K-1 (fiancé) visa for his partner (now-fiancé). After the petition was approved, Plaintiff Harrison's partner was interviewed at the U.S. Embassy in Ankara, Turkey on November 7, 2016. His K-1 visa application was approved and administrative processing completed on January 17, 2017. The U.S. Embassy in Ankara informed Mr. Harrison's partner that he needed to submit his passport for the visa to be issued.

202. On January 30, 2017, after the January 27 Order was signed, the U.S. Embassy in Turkey emailed Plaintiff Harrison's fiancé and explained that his visa process was on hold and that he should contact them again when the travel ban had been lifted to continue the processing of his visa.

203. Subsequently on on February 7, 2017, the U.S. Embassy in Turkey sent a follow-up email to Plaintiff Harrison's fiancé, stating that the embassy had been informed of the ruling in *Washington v. Trump* and that he should send in his passport to the U.S. Embassy in Ankara, Turkey.

204. On March 3, 2017, Plaintiff Harrison and his fiancé traveled again to Turkey to submit the passport and to see one another. On March 6, 2017, the new executive order was announced. As the embassy has

not provided additional information or told Plaintiff Harrison's fiancé that they are no longer processing visas, they submitted his passport on March 8, 2017. They fear the U.S. Embassy in Ankara will not issue the visa before March 16. Even if there is a waiver process might apply to his fiancé, Mr. Harrison is concerned he may not receive the waiver and/or that his fiancé may be required to start the entire process over, resulting in prolonged separation and anxiety for both of them.

205. If the Executive Order remains in effect, Plaintiff Harrison and his partner will remain separated. Mr. Harrison cannot currently travel to Iran, which has put in place a reciprocal ban on U.S. citizen visitors, and the travel to Turkey to see one another is a significant financial burden for Mr. Harrison. Moreover, Plaintiff Harrison's partner has had some negative interactions with the morality police in Iran, leading to harassment and, in one instance, an assault on Mr. Harrison's partner.

206. Plaintiff Ibrahim Ahmed Mohomed has suffered and will continue to suffer harm as a result of the Executive Order. Mr. Mohomed is a United States citizen of Somali origin who lives in Columbus, Ohio. He came to the United States as a refugee in 2009. He is Muslim.

207. Mr. Mohomed's wife and nine children have been approved to come to the United States as refugees. They are all in Ethiopia waiting for authorization to travel to the United States.

208. Plaintiff Mohomed is a member of a minority clan in Somalia. When he and his family were living in Mogadishu, Mr. Mohomed was targeted and threatened by members of the majority clans in Mogadishu, who knew he did not have protection. He came to the United States as a refugee in March 2009.

209. With the rise of insurgents from al-Shabaab and increased fighting in Mogadishu, after Mr. Mohomed's departure, his wife and children fled first to Yemen and then, in 2011, to Ethiopia, where Mr. Mohomed was able to visit them. He applied for them to join him in the United States, and in 2013, they were approved for resettlement in the United States. However, they were still waiting for travel documents when the January 27 order was issued.

210. After the January 27 order was signed, Mr. Mohomed and his family learned from the news that under the new Executive Order, his family would not be able to come to the United States. They remain in Ethiopia waiting to join Mr. Mohomed.

211. The Executive Orders conveys an official message of disapproval and hostility toward the individual Muslim Plaintiffs and their families, making clear that the government deems them outsiders or second-class citizens who are not full members of the political community. This marginalizes them, subjects them to suspicion, scrutiny, and social and political isolation on the basis of religion and national origin, and inflicts other stigmatic and dignitary injuries.

Class Allegations

212. Individual Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b) (1) and (b) (2), on behalf of themselves and all other persons in the United States for whom the Executive Order either interferes with family reunification or the ability to travel internationally and return to the United States. This class includes:

a. Individuals in the United States who currently have an approved or pending petition to the United States government to be reunited with family members who are nationals of Iran, Libya, Somalia, Sudan, Syria or Yemen (the "Designated Countries"), or who will soon file such petition;

b. Refugees in the United States who have currently pending, or will soon file, a petition to the United States government to be reunited with family members; and

c. Nationals of the Designated Countries who reside in the United States and who wish to travel abroad and return to United States or who, prior to issuance of the Executive Order, did travel abroad with the intent to return and are currently abroad.

213. The Plaintiff Class is so numerous that joinder is impracticable. According to the Annual Report of the Visa Office, in 2015, the last year for which data are available, the United States issued approximately 70,000 immigrant and non-immigrant visas to nationals from the six Designated Countries. The U.S. govern-

ment previously estimated that between 60,000 and 100,000 people were affected by Section 3(c) of the January 27 Order.

214. The claims of the Plaintiff Class members share common issues of law, including but not limited to whether the Executive Order violates their associational, religious exercise and due process rights under the First and Fifth Amendments, the Religious Freedom Restoration Act, the Immigration and Nationality Act and the Administrative Procedure Act.

215. The claims of the Plaintiff Class members share common issues of fact, including but not limited to whether the Executive Order is being or will be enforced so as to prevent them or their family members from entering the United States from abroad or from re-entering the United States should they choose to leave the United States briefly, even though they would otherwise be admissible.

216. The claims or defenses of the named Plaintiffs are typical of the claims or defenses of members of the Plaintiff Class.

217. The named Plaintiffs will fairly and adequately protect the interests of the Plaintiff class. The named Plaintiffs have no interest that is now or may be potentially antagonistic to the interests of the Plaintiff class. The attorneys representing the named Plaintiffs include experienced civil rights attorneys who are considered able practitioners in federal constitutional litigation. These attorneys should be appointed as class counsel.

218. Defendants have acted, have threatened to act, and will act on grounds generally applicable to the

Plaintiff Class, thereby making final injunctive and declaratory relief appropriate to the class as a whole. The Plaintiff Class may therefore be properly certified under Federal Rule of Civil Procedure 23(b) (2).

219. Prosecution of separate actions by individual members of the Plaintiff Class would create the risk of inconsistent or varying adjudications and would establish incompatible standards of conduct for individual members of the Plaintiff Class. The Plaintiff Class may therefore be properly certified under Federal Rule of Civil Procedure 23(b)(1).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Establishment Clause, First Amendment to the U.S. Constitution)

220. The foregoing allegations are repeated and incorporated as though fully set forth herein.

221. The Executive Order violates the Establishment Clause by singling out Muslims for disfavored treatment. It has the purpose and effect of inhibiting religion, and it is neither justified by, nor closely fitted to, any compelling governmental interest.

SECOND CLAIM FOR RELIEF

(Equal Protection, Fifth Amendment to the U.S. Constitution)

222. The foregoing allegations are repeated and incorporated as though fully set forth herein.

223. The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides that "No person

shall . . . be deprived of life, liberty, or property, without due process of law." The Clause contains an equal protection component.

224. The Executive Order discriminates on the basis of religion and national origin, each a suspect classification, and is not narrowly tailored to serve a compelling governmental interest, and thereby violates the equal protection component of the Due Process Clause.

225. Additionally, the Executive Order was substantially motivated by an intent to discriminate against Muslims, on whom it has a disparate effect, in further violation of the equal protection component of the Due Process Clause.

THIRD CLAIM FOR RELIEF

(Immigration and Nationality Act & Administrative Procedure Act)

226. The foregoing allegations are repeated and incorporated as though fully set forth herein.

227. The Immigration and Nationality Act provides, with certain exceptions not applicable here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

228. Several clients of IRAP are otherwise eligible and approved for refugee status, but pursuant to the Executive Order, their entry to the United States will be denied or delayed. The Executive Order on its face purports to deny entry to these clients of IRAP because

of their nationality, place of birth, and/or place of residence, in violation of § 1152(a)(1)(A).

229. Plaintiffs Harrison, Mohomed, Jane Doe #2 and John Does #1 and #3 have filed petitions for immigrant visas for members of their families, some of whom have subsequently received visas. Plaintiff Mohomed's wife and nine children's refugee visa applications have been approved, but they have not received travel documents or had their travel scheduled. Plaintiff Harrison's fiancé's visa has been approved and the processing complete but he still does not have a visa issued. Pursuant to the Executive Order, the processing of those petitions and/or the subsequent issuance of visas and travel documents will be delayed or denied, and/or their family members will be denied entry. The Executive Order on its face purports to deny or delay applications because Plaintiffs' family members' nationality, place of birth, and/or place of residence, in violation of § 1152(a)(1)(A).

230. The Executive Order on its face mandates discrimination against those who apply for and/or hold immigrant visas on the basis of their nationality, place of birth, and/or place of residence, in violation of § 1152(a)(1)(A).

231. The actions of Defendants, as set forth above, constitute final agency action and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and without observance of procedure required

by law, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)-(D).

FOURTH CLAIM FOR RELIEF

(Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*)

232. The foregoing allegations are repeated and incorporated as though fully set forth herein.

233. The Executive Order will have the effect of imposing a special disability on the basis of religious views or religious status, by denying or impeding Muslim Plaintiffs, on account of their religion, from accessing benefits relating to their own or their family members' immigration status. In doing so, the Executive Order places a substantial burden on Muslims' exercise of religion in a way that is not the least restrictive means of furthering a compelling governmental interest.

234. This substantial burden is not imposed in furtherance of a compelling governmental interest, and is not the least restrictive means of furthering a compelling governmental interest, in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

FIFTH CLAIM FOR RELIEF

(Refugee Act & Administrative Procedure Act)

235. The foregoing allegations are repeated and incorporated as though fully set forth herein.

236. Pursuant to the President's congressionally delegated authority under 8 U.S.C. § 1182(f), the Executive Order purports to limit the number of refugees who may be admitted in fiscal year 2017 to 50,000, despite

an earlier proclamation setting a limit of 110,000, in violation of the Refugee Act, 8 U.S.C. § 1157(a)(2).

237. President Trump did not engage in "appropriate consultation" prior to altering the number and allocation of refugee admissions for fiscal year 2017, in violation of the Refugee Act, 8 U.S.C. § 1157.

238. The Executive Order makes other alterations to the refugee admission process that are not authorized by the Refugee Act and are in violation of the Refugee Act.

239. The actions of Defendants that have been undertaken pursuant to Section 6 of the Executive Order, as set forth above, constitute final agency action and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and without observance of procedure required by law, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)-(D).

SIXTH CLAIM FOR RELIEF

(Administrative Procedure Act)

240. The foregoing allegations are repeated and incorporated as though fully set forth herein.

241. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

242. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, are contrary to constitutional right, power, privilege, or immunity, including rights protected by the First and Fifth Amendments to the U.S. Constitution, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(B).

243. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

244. The actions of Defendants that are required or permitted by the Executive Order, as set forth above, were without observance of procedure required by law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. A preliminary and permanent injunction enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or participating with them from implementing or enforcing any portion of the Executive Order;

B. A declaration pursuant to 28 U.S.C. § 2201 that the entire Executive Order is unlawful and invalid;

C. An order awarding Plaintiffs costs of suit, and reasonable attorneys' fees and expenses pursuant to any applicable law;

D. Such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted, Dated: Mar. 10, 2017

/s/ Melissa S. Keaney
Karen C. Tumlin†
Nicholas Espíritu†
Melissa S. Keaney†
Esther Sung†
National Immigration Law Center
3435 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sun@nilc.org

Justin B. Cox (Bar No. 17550)
National Immigration Law Center
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 678-5441
Fax: (213) 639-3911
cox@nilc.org

Omar C. Jadwat†
Lee Gelernt†
Hina Shamsi†
Hugh Handeyside†
Sarah L. Mehta†
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org

Cecillia D. Wang†
Cody H. Wofsy†
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org

David Cole†
Daniel Mach†
Heather L. Weaver†
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

David Rocah (Bar No. 27315)
Deborah A. Jeon (Bar No. 06905)
Sonia Kumar (Bar No. 07196)
Nicholas Taichi Steiner (Bar No. 19670)
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

†Admitted *Pro Hac Vice*

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. TDC-17-0361

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, MUHAMMED METEAB, PAUL HARRISON, IBRAHIM AHMED MOHOMED, JOHN DOES NOS. 1 & 3, AND JANE DOE NO. 2, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF STATE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, MICHAEL DEMPSEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

Filed: Mar. 16, 2017

MEMORANDUM OPINION

On March 6, 2017, President Donald J. Trump issued an Executive Order which bars, with certain exceptions, the entry to the United States of nationals of six predominantly Muslim countries, suspends the

entry of refugees for 120 days, and cuts by more than half the number of refugees to be admitted to the United States in the current year. This Executive Order follows a substantially similar Executive Order that is currently the subject of multiple injunctions premised on the conclusion that it likely violates various provisions of the United States Constitution. Pending before the Court is Plaintiffs' Motion for a Temporary Restraining Order or a Preliminary Injunction, filed on March 10, 2017. At issue is whether the President's revised Executive Order, set to take effect on March 16, 2017, should likewise be halted because it violates the Constitution and federal law. For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

INTRODUCTION

On January 27, 2017, President Trump issued Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("First Executive Order" or "First Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). On February 7, 2017, Plaintiffs filed a Complaint alleging that the First Executive Order violated the Establishment Clause of the First Amendment to the United States Constitution, U.S. Const. amend. I; the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-1524 (2012); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2012). On March 6, 2017, in the wake of

several successful legal challenges to the First Executive Order, President Trump issued Executive Order 13,780 ("Second Executive Order" or "Second Order"), which bears the same title as the First Executive Order. 82 Fed. Reg. 13209 (Mar. 9, 2017). The Second Executive Order, by its own terms, is scheduled to go into effect and supplant the First Executive Order on March 16, 2017.

On March 10, 2017, Plaintiffs amended their Complaint to seek the invalidation of the Second Executive Order. Plaintiffs substituted certain individual plaintiffs and added an organizational plaintiff. Their causes of action remain the same. That same day, Plaintiffs filed the pending Motion, seeking to enjoin the Second Executive Order in its entirety before it takes effect. Defendants have received notice of the Motion and filed a brief in opposition to it on March 13, 2017. After Plaintiffs filed a reply brief on March 14, 2017, the Court held a hearing on the Motion on March 15, 2017. With the matter fully briefed and argued, the Court construes the Motion as a Motion for a Preliminary Injunction. The Court now issues its findings of fact and conclusions of law and rules on the Motion.[1]

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[1] On February 22, 2017, Plaintiffs filed a Motion for a Preliminary Injunction of § 5(d) of the Executive Order, ECF No. 64, requesting that the Court enjoin a specific provision of the First Executive Order. With the agreement of the parties, the Court set a briefing and hearing schedule extending to March 28, 2017. The Court will resolve that Motion, which the parties have agreed should be construed to apply to the successor provision of the Second Executive Order, in accordance with the previously established schedule.

FINDINGS OF FACT

I. Executive Order 13,769

The stated purpose of the First Executive Order is to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." 1st Order Preamble. To that end, the First Executive Order states that the United States must be "vigilant during the visa-issuance process," a process that "plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States." 1st Order § 1. The First Executive Order therefore mandates, as relevant here, two courses of action. The first, set forth in Section 3 entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern," invokes the President's authority under 8 U.S.C. § 1182(f) to suspend for 90 days "the immigrant and nonimmigrant entry into the United States of aliens" from the countries of Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen as "detrimental to the interests of the United States." 1st Order § 3(c). Each of these countries has a predominantly Muslim population, including Iraq, Iran, and Yemen which are more than 99 percent Muslim. In addition to providing certain exceptions for diplomatic travel, the provision contains exceptions on a "case-by-case basis" when such an exception is "in the national interest," a term not defined elsewhere in the Order. 1st Order § 3(g). During this 90-day period, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence are to "immediately conduct a review to determine the information needed from any country" to assess whether an

individual from that country applying for a "visa, admission, or other benefit . . . is not a security or public-safety threat" and provide a report on their review to the President within 30 days of the issuance of the Order. 1st Order § 3(a)-(b).

The second course of action relates to refugees. As set out in Section 5(d), the President ordered, pursuant to § 1182(f), that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States" and thus suspended the entry of any refugees above that figure. 1st Order § 5(d). The Order also immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days and imposed an indefinite ban on the entry of refugees from Syria. The Order further required changes to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." 1st Order § 5(b).

The drafting process for the First Executive Order did not involve traditional interagency review by relevant departments and agencies. In particular, there was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security. When the Order was issued in the early evening of Friday, January 27, 2017, the State Department immediately stopped conducting visa interviews of, and processing visa applications from, citizens of any of the seven banned countries. Between 60,000 and 100,000 visas have been revoked.

II. Legal Challenges to the First Executive Order

The First Executive Order prompted numerous legal challenges, including an action filed by the State of Washington and the State of Minnesota in the United States District Court for the Western District of Washington based on the Due Process, Establishment, and Equal Protection Clauses of the Constitution that resulted in a nationwide temporary restraining order against several sections of the First Order. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit, construing the order as a preliminary injunction, upheld the entry of the injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). Although it did not reach the Establishment Clause claim, the Ninth Circuit noted that the asserted claim raised "serious allegations" and presented "significant constitutional questions." *Id.* at 1168. On February 13, 2017, the United States District Court for the Eastern District of Virginia found that plaintiffs had shown a likelihood of success on the merits of an Establishment Clause claim and issued an injunction against enforcement of Section 3(c) of the First Executive Order as to Virginia residents or students enrolled a Virginia state educational institution. *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). These injunctions remain in effect.

III. Executive Order 13,780

On March 6, 2017, President Trump issued a revised Executive Order, to become effective on March 16, 2017, at which point the First Executive Order will be revoked. 2d Order §§ 13, 14. The Second Executive

Order reinstates the 90-day ban on travel for citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen ("the Designated Countries"), but removes Iraq from the list based on its recent efforts to enhance its travel documentation procedures and ongoing cooperation between Iraq and the United States in fighting ISIS. The scope of the ban, however, was narrowed expressly to respond to "judicial concerns." 2d Order § (1)(i). The Order states that it applies only to individuals outside the United States who did not have a valid visa as of the issuance of the First Executive Order and who have not obtained one prior to the effective date of the Second Executive Order. In addition, the travel ban expressly exempts lawful permanent residents ("LPRs"), dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. The Second Executive Order also provides a list of specific situations in which a case-by-case waiver "could be appropriate." 2d Order § 3(c).

The refugee provisions continue to suspend USRAP for 120 days and to reduce the number of refugees to be admitted in fiscal year 2017 to 50,000. However, the minority religion preferences in refugee applications and the complete ban on Syrian refugees have been removed entirely.

Unlike the First Executive Order, the Second Executive Order provides certain information relevant to the national security concerns underlying the decision to ban the entry of citizens of the Designated Countries. The Second Order notes that "the conditions in these countries present heightened threats" because each

country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." 2d Order § 1(d). It provides information from the State Department's *Country Reports on Terrorism 2015* identifying Iran, Sudan, and Syria as longstanding state sponsors of terrorism and describing the presence of members of certain terrorist organizations within those countries. The asserted consequences of these conditions are that the governments of these nations are less willing or less able to provide necessary information for the visa or refugee vetting process, and there is a heightened chance that individuals from these countries will be "terrorist operatives or sympathizers." 2d Order § (1)(d). In light of these factors, the Second Order concludes, the United States is unable "to rely on normal decision-making procedures about travel" as to individuals from these nations, making the present risk of admitting individuals from these countries "unacceptably high." 2d Order § 1(b)(i), (f). The Second Order expressly disavows that the First Executive Order was motivated by religious animus.

The Second Order also states that "Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" and references two Iraqi refugees who were convicted of terrorism-related offenses and a naturalized U.S. citizen who came to the United States from Somalia as a child refugee and has been convicted of a plot to detonate a bomb at a Christmas tree lighting ceremony. 2d Order § 1(h). The Second Order further states that more than 300 persons who entered the United States

as refugees are currently the subjects of counterterrorism investigations. It does not identify any instances of individuals who came from Iran, Libya, Sudan, Syria, or Yemen engaging in terrorist activity in the United States.

The same day that the Second Executive Order was issued, Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President recommending a temporary suspension on the entry to the United States of nationals of certain countries so as to facilitate a review of security risks in the immigration system, for reasons that largely mirror the statements contained in the Second Executive Order.

IV. Public Statements About the Executive Orders

On December 7, 2015, then-presidential candidate Donald Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. Trump promoted the Statement on Twitter that same day, stating that he had "[j]ust put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.R. 209. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then, in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for

the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.R. 261. In a July 24, 2016 interview on Meet the Press soon after he accepted the Republican nomination, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his December 2015 call for a "Muslim ban," Trump characterized it instead as an "expansion." J.R. 220. He explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, he lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

On January 27, 2017, a week after his inauguration, President Trump stated in an interview on the Christian Broadcasting Network that the First Executive Order would give preference in refugee applications to Christians. Referring to Syria, President Trump stated that "[i]f you were a Muslim you could come in, but if you were a Christian, it was almost impossible," a situation that he thought was "very, very unfair." J.R. 201. When President Trump was preparing to sign

the First Executive Order later that day, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142 The day after the Order was issued, former New York City Mayor Rudolph W. Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-248.

In response to the court-issued injunctions against provisions of the First Executive Order, President Trump maintained at a February 16, 2017 news conference that the First Executive Order was lawful but that a new Order would be issued. J.R. 91. Stephen Miller, Senior Policy Advisor to the President, described the changes being made to the Order as "mostly minor technical differences," emphasizing that the "basic policies are still going to be in effect." J.R. 319. White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. As of February 12, 2017, Trump's Statement on Preventing Muslim Immigration remained on his campaign website. J.R. 207.

Upon the issuance of the Second Executive Order, Secretary of State Rex Tillerson described it as "a vital measure for strengthening our national security." J.R. 115. In a March 7, 2017 interview, Secretary of Home-

land Security Kelly stated that the Order was not a Muslim ban but instead was focused on countries with "questionable vetting procedures," then noted that there are 13 or 14 countries with questionable vetting procedures, "not all of them Muslim countries and not all of them in the Middle East." J.R. 150.

In a joint affidavit, 10 former national security, foreign policy, and intelligence officials who served in the White House, Department of State, Department of Homeland Security, and Central Intelligence Agency in Republican and Democratic Administrations, four of whom were aware of the available intelligence relating to potential terrorist threats to the United States as of January 19, 2017, have stated that "there is no national security purpose for a total bar on entry for aliens" from the Designated Countries and that they are unaware of any prior example of a president suspending admission for such a "broad class of people." J.R. 404, 406. The officials note that no terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001, and that no intelligence as of January 19, 2017 suggested any such potential threat. Nor, the former officials assert, is there any rationale for the abrupt shift from individualized vetting to group bans. J.R. 404.

V. The Plaintiffs

Plaintiffs, comprised of six individuals and three organizations, assert that they will be harmed by the implementation of the Second Executive Order. Collectively, they assert that because the Individual Plaintiffs are Muslim and the Organizational Plaintiffs serve or represent Muslim clients or members, the anti-Muslim

animus underlying the Second Executive Order inflicts stigmatizing injuries on them all. The Individual Plaintiffs, who each have one or more relatives who are nationals of one of the Designated Countries and are currently in the process of seeking permission to enter the United States, also claim that if the Second Executive Order is allowed to go into effect, their separation from their loved ones, many of whom live in dangerous conditions, will be unnecessarily prolonged.

Two of the Organizational Plaintiffs, the Hebrew Immigrant Aid Society and the International Refugee Assistance Project, which provide services to refugees, assert that injuries they have suffered under the First Executive Order will continue if the Second Executive Order goes into effect, including lost revenue arising from a reduction in refugee cases that may necessitate reductions in staff. They also assert that their clients, many of whom are refugees now re-settled in the United States, will be harmed by prolonged separation from relatives in the Designated Countries currently seeking to join them. Plaintiff Middle East Studies Association, many of whose members are nationals of one of the Designated Countries, claims that the Second Executive Order would make it more difficult for certain members to travel for academic conferences and field work, and that the inability of its members to enter the United States threatens to cripple its annual conference, on which it relies for a large portion of its yearly revenue.

In light of these alleged imminent harms, Plaintiffs now ask this Court to preliminarily enjoin enforcement of the Second Executive Order.

CONCLUSIONS OF LAW

In this Motion, Plaintiffs seek a preliminary injunction based on their claims that the Second Executive Order violates (1) the Immigration and Nationality Act and (2) the Establishment Clause.

I. Standing

Article III of the Constitution limits the judicial power of the federal courts to actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. To invoke this power, a litigant must have standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). A plaintiff establishes standing by demonstrating (1) a "concrete and particularized" injury that is "actual or imminent," (2) "fairly traceable to the challenged conduct," (3) and "likely to be redressed by a favorable judicial decision." *Id.*; *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007). Standing must be demonstrated for each claim. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). The presence of one plaintiff with standing renders a claim justiciable. *Id.* at 370-71.

A. Immigration and Nationality Act

Several Individual Plaintiffs, specifically John Doe No. 1, John Doe No. 3 and Jane Doe No. 2, have standing to assert the claim that the travel ban for citizens of the Designated Countries violates the INA's prohibition on discrimination in the issuance of immigrant visas on the basis of nationality, 8 U.S.C. § 1152(a). These Individual Plaintiffs are all U.S. citizens or lawful permanent residents who have sponsored relatives who are citizens of one of the Designated Countries and

now seek immigrant visas to enter the United States. They argue that the delay or denial of the issuance of visas will cause injury in the form of continued separation from their family members. *Cf. Covenant Media*, 493 F.3d at 428 (stating that not having an application processed in a timely manner is a form of cognizable injury).

Although neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has explicitly endorsed this basis for standing, the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner challenging the application of the immigration laws to that foreign individual. *See Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (considering an action brought by a U.S. citizen challenging the denial of her husband's visa that failed to result in a majority of the Court agreeing whether the plaintiff had a constitutionally-protected liberty interest in the processing of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (considering the merits of a claim brought by American plaintiffs challenging the denial of a visa to a Belgian journalist whom they had invited to speak in various academic forums in the United States); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (stating that because standing relates to a court's power to hear and adjudicate a case, it is normally "considered a threshold question that must be resolved in [the litigant's] favor before proceeding to the merits"); *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986) ("Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in

Mandel, it would have raised the issue on its own motion."). Other courts have done the same. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (considering an action by a United States citizen challenging the denial of her husband's visa and holding that the citizen had a procedural due process right to a "limited judicial inquiry regarding the reason for the decision"); *Allende v. Shultz*, 845 F.2d 1111, 1114 & n.4 (1st Cir. 1988) (evaluating the merits of a claim brought by scholars and leaders who extended invitations to a foreign national challenging the denial of her visa).

The United States Court of Appeals for the District of Columbia Circuit has found that U.S. citizens and residents have standing to challenge the denial of visas to individuals in whose entry to the United States they have an interest. *See Abourezk*, 785 F.2d at 1050 (finding that U.S. citizens and residents had standing to challenge the denial of visas to foreigners whom they had invited to "attend meetings or address audiences" in the United States); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). In *Legal Assistance*, the court specifically held that U.S. resident sponsors had standing to assert that the State Department's failure to process visa applications of Vietnamese citizens in Hong Kong violated the provision at issue here, 8 U.S.C. § 1152. *Id.* at 471. The court articulated the cognizable injury to the plaintiffs as the prolonged "separation of immediate family members" resulting from the State Department's inaction. *Id.* Here, the

three Individual Plaintiffs who seek the entry of family members from the Designated Countries into the United States face the same harm of continuing separation from their respective family members. This harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation, in barring their entry, would cause the prolonged separation, and the injury is "likely to be redressed by a favorable judicial decision" because invalidation of the relevant provisions of the Executive Order would remove a barrier to their entry. *Hollingsworth*, 133 S. Ct. at 2661.

Defendants nevertheless argue that the Individual Plaintiffs' harm does not arise from a "legally protected interest," citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing an "injury in fact" as a "legally protected interest" which is "concrete and particularized"). However, the case cited by *Lujan* in referencing the "legally protected interest" requirement referred to an injury "deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), *cited with approval in Lujan*, 504 U.S. at 561. Indeed, in *Lujan*, the Court also noted that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63. Since *Lujan*, courts have clarified that a party is not required to have a "substantive right sounding in property or contract" to articulate a legally protected injury. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (recognizing aesthetic and recreational enjoyment as a legally protected inter-

est); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (explaining that although standing "often turns on the nature and source of the claim asserted," "standing in no way depends on the merits" of a plaintiff's claim); *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 363-66 (D.C. Cir. 2005) (Williams, J., concurring) (suggesting that a legally protected interest is merely another label for a judicially cognizable interest). Plaintiffs' interests arising from the separation from family members are consistent with the injury requirement.

Because this claim is a statutory cause of action, these Individual Plaintiffs must also meet the requirement of having interests that fall within the "zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 (1987). In the context of the APA, the "zone of interests" test is "not especially demanding." *Lexmark*, 134 S. Ct. at 1389. A plaintiff's interest need only "arguably" fall within the zone of interests, and the test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (internal quotation marks omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). Because implementing the "underlying intention of our immigration laws regarding the

preservation of the family unit" is among the INA's purposes, the interests of these Individual Plaintiffs, who have sponsored family members who will be denied entry pursuant to the Second Executive Order, fall within the zone of interest protected by the statute. *Legal Assistance*, 45 F.3d at 471-72 (quoting H.R. Rep. No. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680). The Court therefore finds that these three Individual Plaintiffs have standing to assert the claim under 8 U.S.C. § 1152.

Finally, although some of the Individual Plaintiffs' relatives may be eligible for a waiver under the Second Executive Order, because the waiver process presents an additional hurdle that would delay reunification, their claims are ripe. *See Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (finding in a Fair Housing Act action that plaintiffs' claim was ripe where, "assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted").

B. Establishment Clause

At least three of the Individual Plaintiffs, Muhammed Meteab, John Doe No. 1, and John Doe No. 3, each of whom is a Muslim and a lawful permanent resident of the United States, have standing to assert the claim that the Second Executive Order violates the Establishment Clause. John Doe No. 1 and John Doe No. 3 each has a wife who is an Iranian national, currently residing in Iran, who would be barred from entry to the United States by the Executive Orders. John Doe No. 1

has stated that the travel ban has "created significant fear, anxiety, and insecurity" for him and his wife and that the "anti-Muslim views" underlying the Executive Orders have caused him "significant stress and anxiety" to the point that he "worr[ies] that I may not be safe in this country." J.R. 45. John Doe No. 3 has stated that the "anti-Muslim attitudes that are driving" the Executive Orders cause him "stress and anxiety" and lead him to "question whether I even belong in this country." J.R. 49. Meteab, who has Iraqi family members seeking entry as refugees but who are now subject to the Executive Orders' suspension of refugee admissions, has stated that the "official anti-Muslim sentiment" of the Executive Orders has caused "mental stress" and has rendered him "isolated and disparaged" in his community. J.R. 53.

Courts have recognized that for purposes of an Establishment Clause claim, noneconomic, intangible harms to "spiritual, value-laden beliefs" can constitute a particularized injury sufficient to support standing. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. *1997)*; *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to "disfavored treatment" based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); *Catholic League v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a "psychological consequence" constitutes a concrete injury where it is "produced by government condemnation of one's own religion or

endorsement of another's in one's own community"). The injury, however, needs to be a "personal injury suffered" by the plaintiff "*as a consequence* of the alleged constitutional error." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Such a "personal injury" can result, for example, from having "unwelcome direct contract with a religious display that appears to be endorsed by the state," *Suhre*, 131 F.3d at 1086, or from being a member of the geographic community in which the governmental action disfavoring their religion has an impact, *see Awad*, 670 F.3d at 1122-23; *Catholic League*, 624 F.3d at 1048 (finding that two devout Catholics and a Catholic advocacy group, all based in San Francisco, had standing to challenge an allegedly anti-Catholic resolution passed by the city government). Here, where the Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a "personal injury" as a "consequence" of the alleged Establishment Clause violation. *Valley Forge Christian Coll.*, 454 U.S. at 485.

The harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation will allegedly effect the disfavoring of Islam, and the injury is "likely to be redressed by a favorable judicial decision" invalidating the relevant provisions of the Executive Order. *Hollingsworth*, 133 S. Ct. at 2661. The Court therefore finds that these three Individual

Plaintiffs have standing to assert an Establishment Clause challenge.

Having identified at least one plaintiff with standing to assert the claims to be addressed on this Motion, the Court need not address the standing arguments of the other Plaintiffs.

II. Legal Standard

To obtain a preliminary injunction, moving parties must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). A moving party must satisfy each requirement as articulated. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Because a preliminary injunction is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

III. Likelihood of Success on the Merits

Because "courts should be extremely careful not to issue unnecessary constitutional rulings," *Am. Foreign Servo Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam), the Court first addresses the statutory claim and then proceeds, if necessary, to the constitutional claim.

A. Immigration and Nationality Act

Plaintiffs assert that the President's travel ban violated provisions of the INA. The formulation of immigration policies is entrusted exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954). In the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, Congress delegated some of its power to the President in the form of what is now Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f) ("§ 1182(f)"), which provides that:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In the Second Executive Order, President Trump invokes § 1182(f) in issuing the travel ban against citizens of the Designated Countries. *See* 2d Order § 2(c).

Plaintiffs argue that by generally barring the entry of citizens of the Designated Countries, the Second Order violates Section 202(a) of the INA, codified at 8 U.S.C. § 1152(a) ("§ 1152(a)"), which provides that, with certain exceptions:

> No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]

8 U.S.C. § 1152(a)(1)(A).

Section 1152(a) was enacted as part of the Immigration and Nationality Act of 1965, which was adopted expressly to abolish the "national origins system" imposed by the Immigration Act of 1924, which keyed yearly immigration quotas for particular nations to the percentage of foreign-born individuals of that nationality who were living in the continental United States, based on the 1920 census, in order to "maintain, to some degree, the ethnic composition of the American people." H. Rep. No. 89-745, at 9 (1965). President Johnson sought this reform because the national origins system was at odds with "our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." *Id.* at 11.

At first glance, President Trump's action appears to conflict with the bar on discrimination on the basis of nationality. However, upon consideration of the specific statutory language, the Court finds no direct conflict. Section 1182(f) authorizes the President to bar "entry" to certain classes of aliens. 8 U.S.C. § 1182(f). Section 1152(a) bars discrimination based on nationality in the "issuance of an immigrant visa." *Id.* § 1152(a)(1)(A). Although entry is not currently defined in the INA, until 1997 it was defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, voluntary or otherwise." *Id.* § 1101(a)(13) (1994). In the same section of the current INA, the term "admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). The term "immigrant visa" is sepa-

rately defined as "an immigrant visa required by this chapter and properly issued by a consular officer at his office outside the United States to an eligible immigrant under the provisions of this chapter." *Id.* § 1101(a)(16). The INA, in turn, makes clear that "[n]othing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States." *Id.* § 1201(h). Thus, § 1152(a) and § 1182(f) appear to address different activities handled by different government officials. When two statutory provisions "are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Accordingly, an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas.

Although the Second Executive Order does not explicitly bar citizens of the Designated Countries from receiving a visa, the Government acknowledged at oral argument that as a result of the Second Executive Order, any individual not deemed to fall within one of the exempt categories, or to be eligible for a waiver, will be denied a visa. Thus, although the Second Executive Order speaks only of barring entry, it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries. Under the plain language of the statute, the barring of immigrant visas on that basis would run contrary to § 1152(a). Just as § 1152(a) does not intrude upon the President's

§ 1182(f) authority to bar entry to the United States, the converse is also true: the § 1182(f) authority to bar entry does not extend to the issuance of immigrant visas. The power the President has in the immigration context, and certainly the power he has by virtue of the INA, is not his by right, but derives from "the statutory authority conferred by Congress." *Abourezk*, 785 F.2d at 1061. Notably, the Government has identified no instance in which § 1182(f) was invoked to bar the issuance of visas based on nationality, a step not contemplated by the language of the statute.

To the extent the Government argues that § 1152(a) does not constrain the ability of the President to use § 1182(f) to bar the issuance of immigrant visas, the Court finds no such exception. Section 1152(a) requires a particular result, namely non-discrimination in the issuance of immigrant visas on specific, enumerated bases. Section 1182(f), by contrast, mandates no particular action, but instead sets out general parameters for the President's power to bar entry. Thus, to the extent that § 1152(a) and § 1182(f) may conflict on the question whether the President can bar the issuance of immigrant visas based on nationality, § 1152(a), as the more specific provision, controls the more general § 1182(f). *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *United States v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987). Moreover, § 1152(a) explicitly excludes certain sections of the INA from its scope, specifically §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. 8 U.S.C. § 1152(a)(1)(A). Section 1182(f) is not among the exceptions. Because

the enumerated exceptions illustrate that Congress "knows how to expand 'the jurisdictional reach of a statute,'" the absence of any reference to § 1182(f) among these exceptions provides strong evidence that Congress did not intend for § 1182(f) to be exempt from the anti-discrimination provision of § 1152(a). *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991)).

The Government further argues that the President may nevertheless engage in discrimination on the basis of nationality in the issuance of immigrant visas based on 8 U.S.C. § 1152(a)(1)(B), which states that "[n]othing in [§ 1152(a)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." As that statutory provision expressly applies to the Secretary of State, it does not provide a basis to uphold an otherwise discriminatory action by the President in an Executive Order. Even if the Court were to construe Plaintiffs' claim to be that the State Department's anticipated denial of immigrant visas based on nationality for a period of 90 days would run contrary to § 1152(a), the text of § 1152(a)(1)(B) does not comfortably establish that such a delay falls within this exception. Although § 1152(a)(1)(B) specifically allows the Secretary to vary "locations" and "procedures" without running afoul of the nondiscrimination provision, it does not include within the exception any authority to make temporal adjustments. Because time, place, and

manner are different concepts, and § 1152(a)(1)(B) addresses only place and manner, the Court cannot readily conclude that § 1152(a)(1)(B) permits the imminent 90-day ban on immigrant visas based on nationality despite its apparent violation of the non-discrimination provision of § 1152(a)(1)(A).

Finally, the Government asserts that the President has the authority to bar the issuance of visas based on nationality pursuant to Section 215(a) of the INA, codified at 8 U.S.C. § 1185(a) ("§ 1185(a)"), which provides that:

> Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). As support for this interpretation, the Government cites President Carter's invocation of 8 U.S.C. § 1185(a)(1) to bar entry of Iranian nationals during the Iran Hostage Crisis in 1979. Crucially, however, President Carter used § 1185(a)(1) to "prescribe limitations and exceptions on the rules and regulations" governing "Iranians holding nonimmigrant visas," a category that is outside the ambit of § 1152(a). 44 Fed. Reg. 67947, 67947 (1979). The Government has identified no instance in which § 1185(a) has been used to control the immigrant visa issuance process. Under the principle of statutory construction that "all parts of a statute, if at all possible, are to be given effect," *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973), the Court

concludes that, as with § 1182(f), the most fair reading of § 1182(a)(1) is that it provides the President with the authority to regulate and control whether and how aliens enter or exit the United States, but does not extend to regulating the separate activity of issuance of immigrant visas.

Because there is no clear basis to conclude that § 1182(f) is exempt from the nondiscrimination provision of § 1152(a) or that the President is authorized to impose nationality-based distinctions on the immigrant visa issuance process through another statutory provision, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas, which the statutory language makes clear is the extent of the scope of that anti-discrimination requirement. They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Beyond § 1152(a), Plaintiffs make the additional argument under the INA that because the Second Executive Order's nationality-based distinctions are ostensibly aimed at potential terrorist threats, the Order conflicts with 8 U.S.C. § 1182(a)(3)(B), which renders an individual inadmissible based on an enumerated list of terrorism considerations. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(I), (IV), and (VII). Plaintiffs contend that these provisions indicate that Congress has established a mechanism for the individualized assessment of the terror risk an immigrant poses, such that Congress did not envision that

terrorism would be addressed through broad nationality- or religion-based bans pursuant to § 1182(f). But Plaintiffs provide no support for their contention and make no showing that § 1182(a)(3)(B) and § 1182(f) "cannot mutually coexist." *Radzanower*, 426 U.S. at 155. Although Plaintiffs try to cast § 1182(a) as an emphatically individualized enterprise, neither § 1182(a) nor § 1182(f) purports to limit the President to barring entry only to classes of aliens delineated in § 1182(a). Thus, Plaintiffs are unlikely to succeed on the merits of this claim.

B. Establishment Clause

Plaintiffs assert that the travel ban on citizens from the Designated Countries is President Trump's fulfillment of his campaign promise to ban Muslims from entering the United States. They argue that the Second Executive Order therefore violates the Establishment Clause. The First Amendment prohibits any "law respecting an establishment of religion," U.S. Const. amend. I, and "mandates governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When a law does not differentiate among religions on its face, courts apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). Under the *Lemon* test, to withstand an Establishment Clause challenge (1) an act must have a secular purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not "foster 'an excessive government entanglement with religion.'" *Id.* at 612-613 (quoting *Walz v. Tax*

Comm'n, 397 U.S. 664, 674 (1970)). All three prongs of the test must be satisfied. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The mere identification of any secular purpose for the government action does not satisfy the purpose test. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 865 n.13 (2005). Such a rule "would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action." *Id.* ("[A]n approach that credits *any* valid purpose . . . has not been the way the Court has approached government action that implicates establishment." (emphasis added)). Thus, although governmental statements of purpose generally receive deference, a secular purpose must be "genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864. If a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is "secondary," the purpose test has not been satisfied. *Id.* at 860, 862-65; *see also Edwards*, 482 U.S. at 594 (finding a violation of the Establishment Clause where the "primary purpose" of the challenged act was "to endorse a particular religious doctrine").

An assessment of the purpose of an action is a "common" task for courts. *McCreary*, 545 U.S. at 861. In determining purpose, a court acts as an "objective observer" who considers "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). An "understanding of official

objective" can emerge from "readily discoverable fact" without "judicial psychoanalysis" of the decisionmaker. *Id.*

Plaintiffs argue that the Second Executive Order fails the purpose prong because there is substantial direct evidence that the travel ban was motivated by a desire to ban Muslims as a group from entering the United States. Plaintiffs' evidence on this point consists primarily of public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order. Considering statements from these time periods is appropriate because courts may consider "the historical context" of the action and the "specific sequence of events" leading up to it. *Edwards*, 482 U.S. at 594-95. Such evidence is "perfectly probative" and is considered as a matter of "common sense"; indeed, courts are "forbid[den] . . . 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)); *cf. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1987) (including the "historical background of the decision," the "specific sequence of events leading up [to] the challenged decision," and "contemporary statements of the decision-making body" as factors indicative of discriminatory intent), *cited with approval in Edwards*, 482 U.S. at 595.

> One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian

> heritage. This presents no incongruity, however, because purpose matters.

McCreary, 545 U.S. at 866 n.14.

Specifically, the evidence offered by Plaintiffs includes numerous statements by President Trump expressing an intent to issue a Muslim ban or otherwise conveying anti-Muslim sentiments. For example, on December 7, 2015, then a Republican primary candidate, Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website "calling for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." into the country." J.R. 261. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, Trump lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in

their communities and places of worship as part of their global jihad." J.R. 245.

Significantly, the record also includes specific statements directly establishing that Trump intended to effectuate a partial Muslim ban by banning entry by citizens of specific predominantly Muslim countries deemed to be dangerous, as a means to avoid, for political reasons, an action explicitly directed at Muslims. In a July 24, 2016 interview on Meet the Press, soon after becoming the Republican presidential nominee, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his call for a "Muslim ban," he described it as an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. When President Trump was preparing to sign the First Executive Order, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142. The day after the First Executive Order was issued, Mayor Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-48. These types of public state-

ments were relied upon by the Eastern District of Virginia in enjoining the First Executive Order based on a likelihood of success on an Establishment Clause claim, *Aziz*, 2017 WL 580855, at *11, and the Ninth Circuit in concluding that an Establishment Clause claim against that Order raised "serious allegations" and presented "significant constitutional questions." *Washington*, 847 F.3d at 1168.

These statements, which include explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban. In particular, the direct statements by President Trump and Mayor Giuliani's account of his conversations with President Trump reveal that the plan had been to bar the entry of nationals of predominantly Muslim countries deemed to constitute dangerous territory in order to approximate a Muslim ban without calling it one precisely the form of the travel ban in the First Executive Order. *See Aziz*, 2017 WL 580855, at *4 (quoting from a July 17, 2016 interview during which then-candidate Trump, upon hearing a tweet stating "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," responded "So you call it territories. OK? We're gonna do territories."). Such explicit statements of a religious purpose are "readily discoverable fact[s]" that allow the Court to identify the purpose of this government action without resort to "judicial psychoanalysis." *McCreary*, 545 U.S. at 862. They constitute clear statements of religious

purpose comparable to those relied upon in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), where the court found that a Ten Commandments display at a state courthouse was erected for a religious purpose in part based on the chief justice stating at the dedication ceremony that "in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1286, 1296 ("[N]o psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.").

Relying primarily on this record, Plaintiffs asks this Court to issue an injunction against the Second Executive Order on Establishment Clause grounds. In considering this request, the same record of public statements by President Trump remains highly relevant. In *McCreary*, where the Court was reviewing a third attempt to create a courthouse display including the Ten Commandments after two prior displays had been deemed unconstitutional, it held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absentedminded objective observer, not one presumed familiar with the history of the government's action and competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

The Second Executive Order, issued only six weeks after the First Executive Order, differs, as relevant here, in that the preference for religious minorities in the refugee process has been removed. It also removes Iraq from the list of Designated Countries,

exempts certain categories of individuals from the ban, and lists other categories of individuals who may be eligible for a case-by-case waiver from the ban. Despite these changes, the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as "mostly minor technical differences," and stated that the "basic policies are still going to be in effect." J.R. 319. When the Second Executive Order was signed on March 6, 2017, White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. The Second Executive Order itself explicitly states that the changes, particularly the addition of exemption and waiver categories, were made to address 'judicial concerns," 2d Order § 1(i), including those raised by the Ninth Circuit, which upheld an injunction based on due process concerns, *Washington*, 847 F.3d at 1156.

The removal of the preference for religious minorities in the refugee system, which was the only explicit reference to religion in the First Executive Order, does not cure the Second Executive Order of Establishment Clause concerns. Crucially, the core policy outcome of a blanket ban on entry of nationals from the Designated Countries remains. When President Trump discussed his planned Muslim ban, he described not the prefer-

ence for religious minorities, but the plan to ban the entry of nationals from certain dangerous countries as a means to carry out the Muslim ban. These statements thus continue to explain the religious purpose behind the travel ban in the Second Executive Order. Under these circumstances, the fact that the Second Executive Order is facially neutral in terms of religion is not dispositive. *See Bd. Of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-702 (1994) (holding that a facially neutral delegation of civic power to "qualified voters" of a village predominantly comprised of followers of Satmas Hasidism was a "purposeful and forbidden" violation of the Establishment Clause); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 542 (1993) (holding that a facially neutral city ordinance prohibiting animal sacrifice and intended to target the Santeria faith violated the Free Exercise Clause because "the Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and action targeting religion "cannot be shielded by mere compliance with the requirement of facial neutrality").

Defendants do not directly contest that this record of public statements reveals a religious motivation for the travel ban. Rather, they argue that many of the statements may not be considered because they were made outside the formal government decisionmaking process or before President Trump became a government official. Although *McCreary*, relied upon by Defendants, states that a court considers "the text, legislative history, and implementation" of an action and "comparable" official acts, it did not purport to

list the only materials appropriate for consideration.[2] 545 U.S. at 862. Notably, in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit considered quotes from county commissioners that appeared in news reports in finding that a Ten Commandments display violated the Establishment Clause. *Id.* at 701. Likewise, in *Glassroth*, the United States Court of Appeals for the Eleventh Circuit found an Establishment Clause violation based on a record that included the state chief justice's campaign materials, including billboards and television commercials, proclaiming him to be the "Ten Commandments Judge." 335 F.3d at 1282, 1284-85, 1297.

Although statements must be fairly "attributed to [a] government actor," *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010), Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign

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[2] In *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006), cited by Defendants, the Court criticized a dissent's reliance on press statements by senior government officials, rather than the President's formal written determination mandated by the Uniform Code of Military Justice, to provide justification for the government's determination that applying court-martial rules to a terrorism suspect's military commission was impracticable. *Id.* at 624 & n.52. It did not address what facts could be considered in assessing government purpose under the Establishment Clause, where courts have held that facts outside the specific text of the government decision may be considered. *See Edwards*, 482 U.S. at 594-95.

does not wipe them from the "reasonable memory" of a "reasonable observer." *McCreary*, 545 U.S. at 866. Notably, the record in *Glassroth* also included the fact that the state chief justice, before securing election to that position, had made a campaign promise to install the Ten Commandments in the state courthouse, as well as campaign materials issued by members of his campaign committee. *Glassroth*, 335 F.3d at 1285. Because the state chief justice was the ultimate decisionmaker, and his campaign committee's statements were fairly attributable to him, such material is appropriately considered in assessing purpose under the Establishment Clause. *See id.* at 1285; *Glassman*, 628 F.3d at 147. Likewise, all of the public statements at issue here are fairly attributable to President Trump, the government decisionmaker for the Second Executive Order, because they were made by President Trump himself, whether during the campaign or as President, by White House staff, or by a close campaign advisor who was relaying a conversation he had with the President. In contrast, Defendants' cited case law does not involve statements fairly attributable to the government decisionmaker. *See, e.g.*, *Glassman*, 628 F.3d at 147 (declining to consider statements made by members of a church that was alleged to have benefited from government action); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) (declining to consider statements by the artist where the government's display of artwork is challenged); *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004) (declining to consider statements by a judge and county residents about a Ten Commandments display where the county government's purpose was at issue).

Defendants also argue that the Second Executive Order explicitly articulates a national security purpose, and that unlike its predecessor, it includes relevant information about national security concerns. In particular, it asserts that there is a heightened chance that individuals from the Designated Countries will be "terrorist operatives or sympathizers" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and those governments are therefore less likely to provide necessary information for the immigrant vetting process. 2d Order § 1(d). The Order also references a history of persons born abroad committing terrorism-related crimes in the United States and identifies three specific cases of such crimes. The Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Plaintiffs argue that the stated national security rationale is limited and flawed. Among other points, they note that the Second Executive Order does not identify examples of foreign nationals from Iran, Libya, Sudan, Syria, or Yemen who engaged in terrorist activity in the United States. They also note that a report from the Department of Homeland Security, Office of Intelligence and Analysis, concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity" and that "few of the impacted countries have terrorist groups that threaten the West." J.R. 158. Furthermore, they note that the 300 FBI investigations are dwarfed by the over

11,000 counterterrorism investigations at any one time, only a fraction of which lead to actual evidence of illegal activity. Finally, they note that Secretary of Homeland Security Kelly stated that there are additional countries, some of which are not predominantly Muslim, that have vetting problems but are not included among the banned countries. These facts raise legitimate questions whether the travel ban for the Designated Countries is actually warranted.

Generally, however, courts should afford deference to national security and foreign policy judgments of the Executive Branch. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). The Court thus should not, and will not, second-guess the conclusion that national security interests would be served by the travel ban. The question, however, is not simply whether the Government has identified a secular purpose for the travel ban. If the stated secular purpose is secondary to the religious purpose, the Establishment Clause would be violated. *See McCreary*, 545 U.S. at 864, 866 n.14 (stating that it is appropriate to treat two like acts differently where one has a "history manifesting sectarian purpose that the other lacks"). Making assessments on purpose, and the relative weight of different purposes, is a core judicial function. *See id.* at 861-62.

In this highly unique case, the record provides strong indications that the national security purpose is not the primary purpose for the travel ban. First, the core concept of the travel ban was adopted in the First Executive Order, without the interagency consultation process typically followed on such matters. Notably, the document providing the recommendation of the Attor-

ney General and the Secretary of Homeland Security was issued not before the First Executive Order, but on March 6, 2017, the same day that the Second Executive Order was issued. The fact that the White House took the highly irregular step of first introducing the travel ban without receiving the input and judgment of the relevant national security agencies strongly suggests that the religious purpose was primary, and the national security purpose, even if legitimate, is a secondary *post hoc* rationale.

Second, the fact that the national security rationale was offered only after courts issued injunctions against the First Executive Order suggests that the religious purpose has been, and remains, primary. Courts have been skeptical of statements of purpose "expressly disclaim[ing] any attempt to endorse religion" when made after a judicial finding of impermissible purpose, describing them as a "litigating position." *E.g.*, *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 444, 448 (6th Cir. 2010). Indeed, the Second Executive Order itself acknowledges that the changes made since the First Executive Order were to address "judicial concerns." 2d Order § 1(i).

Third, although it is undisputed that there are heightened security risks with the Designated Countries, as reflected in the fact that those who traveled to those countries or were nationals of some of those countries have previously been barred from the Visa Waiver Program, *see* 8 U.S.C. § 1187(a)(12), the travel ban represents an unprecedented response. Significantly, during the time period since the Reagan Administration, which includes the immediate aftermath of

September 11, 2001, there have been no instances in which the President has invoked his authority under § 1182(f) or § 1185 to issue a ban on the entry into the United States of all citizens from more than one country at the same time, much less six nations all at once. Kate M. Manuel, Congo Research Serv., R44743, Executive Authority to Exclude Aliens: In Brief (2017); J.R. 405-406. In the two instances in which nationals from a single country were temporarily stopped, there was an articulable triggering event that warranted such action. Manuel, *supra*, at 10-11 (referencing the suspension of the entry of Cuban nationals under President Reagan after Cuba stopped complying with U.S. immigration requirements and the revocation of visas issued to Iranians under President Carter during the Iran Hostage Crisis). The Second Executive Order does not explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks. But while the travel ban bears no resemblance to any response to a national security risk in recent history, it bears a clear resemblance to the precise action that President Trump described as effectuating his Muslim ban. Thus, it is more likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban. Accordingly, there is a likelihood that the travel ban violates the Establishment Clause.

Finally, Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President,

the Court need only consider whether the Government has offered a "facially legitimate and bona fide reason" for its action. *See Mandel*, 408 U.S. at 777. This standard is most typically applied when a court is asked to review an executive officer's decision to deny a visa. *See, e.g.*, *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); or in other matters relating to the immigration rights of individual aliens or citizens, *see Fiallo v. Bell*, 430 U.S. 787, 790 (1977). The *Mandel* test, however, does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches." *Washington*, 847 F.3d at 1162 (holding that courts possess "the authority to review executive action" on matters of immigration and national security for "compliance with the Constitution"). In such situations, the power of the Executive and Legislative branches to create immigration law remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

Even when exercising their immigration powers, the political branches must choose "constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 941. Courts have therefore rejected arguments that they forgo the traditional constitutional analysis when a plaintiff has challenged the Government's exercise of immigration power as violating the Constitution. *See, e.g.*, *Zadvydas*, 533 U.S. at 695 (rejecting deference to plenary power in determining that indefinite detention of aliens violated the Due Process Clause); *Chadha*, 462 U.S. at 941-43 (stating that Congress's plenary authority over the regulation

of aliens does not permit it to "offend some other constitutional restriction" and holding that a statute permitting Congress to overturn the Executive Branch's decision to allow a deportable alien to remain in the United States violated constitutional provisions relating to separation of powers); *Washington*, 847 F.3d at 1167-68 (referencing standard Establishment Clause principles as applicable to the claim that the First Executive Order violated the Establishment Clause). Thus, although "[t]he Executive has broad discretion over the admission and exclusion of aliens," that discretion "may not transgress constitutional limitations," and it is "the duty of the courts" to "say where those statutory and constitutional boundaries lie." *Abourezk*, 785 F.2d at 1061.

Mindful of "the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their Establishment Clause claim. Having reached this conclusion, the Court need not address Plaintiffs' likelihood of success on their Equal Protection Clause claim.

IV. Irreparable Harm

Having concluded that Plaintiffs have established a likelihood of success on the merits, the Court turns to whether they have shown a likelihood of irreparable harm. The Supreme Court has held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*

v. Burns, 427 U.S. 347, 373 (1976) (finding irreparable harm upon a violation of the freedom of association). The Fourth Circuit has applied this holding to cases involving the freedom of speech and expression. *E.g.*, *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190, 191-92 (4th Cir. 2013); *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). Although the Fourth Circuit has not yet held that a violation of the Establishment Clause likewise necessarily results in irreparable harm, other circuits have. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (finding irreparable harm in an Establishment Clause case and stating that the "harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion").

Here, as in *Elrod*, "First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Elrod*, 427 U.S. at 373. "[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303. The Court accordingly finds that Plaintiffs have established a likelihood of irreparable harm when the Second Executive Order takes effect.

V. Balance of the Equities and the Public Interest

While Plaintiffs would likely face irreparable harm in the absence of an injunction, Defendants are not directly harmed by a preliminary injunction preventing them from enforcing an Executive Order likely to be found unconstitutional. *See Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Aziz*, 2017 WL 580855, at *10. Preventing an Establishment Clause violation has significant public benefit beyond the interests of the Plaintiffs. The Supreme Court has recognized the "fundamental place held by the Establishment Clause in our constitutional scheme." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). The Founders "brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion" because they understood that "governmentally established religions and religious persecution go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 432-33 (1962). When government chooses sides among religions, the "inevitable result" is "hatred, disrespect, and even contempt" from those who adhere to different beliefs. *See id.* at 431. Thus, to avoid sowing seeds of division in our nation, upholding this fundamental constitutional principle at the core of our Nation's identity plainly serves a significant public interest.

At the same time, the Supreme Court has stated that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Defendants, however, have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel

ban, a measure that has not been deemed necessary at any other time in recent history. Thus, the balance of the equities and the public interest favor the issuance of an injunction.

VI. Scope of Relief

Plaintiffs have asked the Court to issue an injunction blocking the Executive Order in its entirety. The Court declines to grant such broad relief. The Plaintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order. The Court will enjoin that provision only. Although Plaintiffs have argued that sections relating to the temporary ban on refugees also offend the Establishment Clause, they did not sufficiently develop that argument to warrant an injunction on those sections at this time. As for the remaining portions of the Second Order, Plaintiffs have not provided a sufficient basis to establish their invalidity. Thus, the Court declines to enjoin the Second Order in its entirety.

With respect to Section 2(c), the Court concludes that nationwide relief is warranted. It is "well established" that a federal district court has "wide discretion to fashion appropriate injunctive relief in a particular case." *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992); *see also Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (holding that the "Constitution vests the District Court with 'the judicial Power of the United States,'" which "extends across the country" (quoting U.S. Const. art. III § 1)), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Injunctive relief "should be no more burden-

some to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). However, nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See id.*; *Richmond Tenants Org., Inc.*, 956 F.3d at 1308-39; *Texas*, 809 F.3d at 188.

The Court has found that Plaintiffs are likely to be able to establish that Section 2(c) of the Second Executive Order violates the Establishment Clause. Both the Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States, indicating that nationwide relief may be appropriate. *Richmond Tenants Org., Inc.*, 956 F.3d at 1309 (holding that a nationwide injunction was "appropriately tailored" because the plaintiffs lived in different parts of the country). Moreover, although the Government has argued that relief should be strictly limited to the specific interests of the Plaintiffs, an Establishment Clause violation has impacts beyond the personal interests of individual parties. *Joyner v. Forsyth Cty.*, 653 F.3d 341, 355 (4th Cir. 2011) ("[T]hese plaintiffs are not so different from other citizens who may feel in some way marginalized on account of their religious beliefs and who decline to risk the further ostracism that may ensue from bringing their case to court or who simply lack the resources to do so."); *City of St. Charles*, 794 F.2d at 275 (stating that a violation of the Establishment Clause causes "harm to society"). Here, nationwide relief is appropriate because this case involves an alleged violation of the Establishment Clause by the federal government manifested in immigration policy with nationwide effect. *See Decker v.*

O'Donnell, 661 F.2d 598, 618 (7th Cir. 1980) (affirming a nationwide injunction in a facial challenge to a federal statute and regulations on Establishment Clause grounds).

Finally, under these facts, a "fragmented" approach "would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67. "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*, and the Supreme Court has described immigration policy as a comprehensive and *unified* system." *Texas*, 80 F.3d at 187-88 (footnotes and quotation marks omitted). In light of the constitutional harms likely to befall Plaintiffs in the absence of relief, and the constitutional mandate of a uniform immigration law and policy, Section 2(c) of the Second Executive Order will be enjoined on a nationwide basis.

CONCLUSION

For the foregoing reasons, the Motion is GRANTED IN PART and DENIED IN PART. The Court will issue an injunction barring enforcement of Section 2(c) of the Second Executive Order. A separate Order shall issue.

Date: Mar. 15, 2017

/s/ THEODORE D. CHUANG
THEODORE D. CHUANG
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. TDC-17-0361

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, MUHAMMED METEAB, PAUL HARRISON, IBRAHIM AHMED MOHOMED, JOHN DOES NOS. 1 & 3, AND JANE DOE NO. 2, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF STATE, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, AND MICHAEL DEMPSEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS

Filed: Mar. 16, 2017

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court finds that the Plaintiffs have standing to maintain this civil action and have established that they are likely to prevail on the merits, that they are likely to suffer irreparable harm in the

absence of injunctive relief, and that the balance of the equities and the public interest favor an injunction.

Accordingly, it is hereby ORDERED that:

1. Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order is construed as a Motion for a Preliminary Injunction.

2. The Motion, ECF No. 95, is GRANTED IN PART and DENIED IN PART.

3. The Motion is GRANTED as to Section 2(c) of Executive Order 13,780 ("Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States"). **Defendants, and all officers, agents, and employees of the Executive Branch of the United States government, and anyone acting under their authorization or direction, are ENJOINED from enforcing Section 2(c) of Executive Order 13,780.**

4. This Preliminary Injunction is granted on a nationwide basis and prohibits the enforcement of Section 2(c) of Executive Order 13,780 in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas, pending further orders from this court.

5. Plaintiffs are not required to pay a security deposit.

6. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this Order be filed.

7. The Motion is DENIED as to all other provisions of Executive Order 13,780.

Date: Mar. 15, 2017

/s/ THEODORE D. CHUANG
THEODORE D. CHUANG
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1351

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS; HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2, PLAINTIFFS-APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; DANIEL R. COATS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE, DEFENDANTS-APPELLANTS

Argued: May 8, 2017
Decided: May 25, 2017
Amended: May 31, 2017

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:17-cv-00361-TDC)

Affirmed in part, vacated in part by published opinion. Chief Judge Gregory wrote the opinion, in which Judges Motz, King, Wynn, Diaz, Floyd, and Harris joined in full. Judge Traxler wrote an opinion concurring in the judgment. Judge Keenan wrote an opinion concurring in part and concurring in the judgment, in which Judge Thacker joined except as to Part II.A.i. Judge Wynn wrote a concurring opinion. Judge Thacker wrote a concurring opinion. Judge Niemeyer wrote a dissenting opinion, in which Judges Shedd and Agee joined. Judge Shedd wrote a dissenting opinion, in which Judges Niemeyer and Agee joined. Judge Agee wrote a dissenting opinion, in which Judges Niemeyer and Shedd joined.

Before: GREGORY, Chief Judge, and NIEMEYER, MOTZ, TRAXLER, KING, SHEDD, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, and HARRIS, Circuit Judges.

GREGORY, Chief Judge[1]:

The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866), remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untir-

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[1] Judges Motz, King, Wynn, Diaz, Floyd, and Harris join this opinion in full, Judge Traxler concurs in the judgment, and Judges Keenan and Thacker concur in substantial part and concur in the judgment.

ing sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation. Therefore, for the reasons that follow, we affirm in substantial part the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order.

I.

A.

In the early evening of January 27, 2017—seven days after taking the oath of office—President Donald J. Trump signed Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("EO-1" or "First Executive Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). Referencing the past and present failings of the visa-issuance process, the First Executive Order had the stated purpose of "protect[ing] the American people from terrorist attacks by foreign nationals." EO-1, Preamble. To protect Americans, EO-1 explained, the United States must ensure that it does not admit foreign nationals who "bear hostile attitudes" toward our nation and our Constitution, who would "place violent ideologies over American law," or who "engage in acts of bigotry or hatred" (such as "'honor' killings"). *Id.* § 1.

To that end, the President invoked his authority under 8 U.S.C. § 1182(f) and immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.[2] *See* EO-1, § 3(c). During the ninety-day period, the Secretary of Homeland Security, Secretary of State, and Director of National Intelligence were to "immediately conduct a review to determine the information needed from any country" to assess whether individuals seeking entry from those countries posed a national security threat. Those cabinet officers were to deliver a series of reports updating the President as to that review and the implementation of EO-1. *See id.* § 3(a)-(b), (h).

The First Executive Order also placed several constraints on the admission of refugees into the country. It reduced the number of refugees to be admitted in fiscal year 2017 from 110,000 to 50,000 and barred indefinitely the admission of Syrian refugees. *Id.* § 5(c)-(d). It further ordered the Secretary of State to suspend for 120 days the United States Refugee Admissions Program ("USRAP"). *Id.* § 5(a). Upon resumption of USRAP, EO-1 directed the Secretary of State to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b).

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[2] According to the Pew Research Center, Iraq's population is 99% Muslim, Iran's is 99.5%, Libya's is 96.6%, Sudan's is 90.7%, Somalia's is 99.8%, Syria's is 92.8%, and Yemen's is 99.1%. *See* Pew Res. Ctr., *The Global Religious Landscape* 45-50 (2012).

Individuals, organizations, and states across the nation challenged the First Executive Order in federal court. A judge in the Western District of Washington granted a Temporary Restraining Order ("TRO"), enjoining enforcement nationwide of Sections 3(c), 5(a)-(c), and 5(e). *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit subsequently denied the Government's request to stay the TRO pending appeal and declined to "rewrite" EO-1 by narrowing the TRO's scope, noting that the "political branches are far better equipped" for that task. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam). At the Ninth Circuit's invitation, and in an effort to avoid further litigation concerning the First Executive Order, the President enacted a second order ("EO-2" or "Second Executive Order") on March 6, 2017. Exec. Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). The Second Executive Order revoked and replaced the First Executive Order. *Id.* § 1(i).

Section 2(c) of EO-2—"Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period"—is at the heart of the dispute in this case. This section reinstated the ninety-day suspension of entry for nationals from six countries, eliminating Iraq from the list, but retaining Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "Designated Countries"). EO-2, § 2(c). The President, again invoking 8 U.S.C. § 1182(f) and also citing 8 U.S.C. § 1185(a), declared that the "unrestricted entry" of nationals from

these countries "would be detrimental to the interests of the United States." *Id.*[3]

The Second Executive Order, unlike its predecessor, states that nationals from the Designated Countries warrant "additional scrutiny" because "the conditions in these countries present heightened threats." *Id.* § 1(d). In justifying the selection of the Designated Countries, EO-2 explains, "Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active

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[3] Section 2(c) reads in full:

To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

conflict zones."[4] *Id.* The Second Executive Order states that "until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* § 1(f).

The Second Executive Order also provides brief descriptions of the conditions in each of the Designated Countries. It notes, for instance, that "Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas[, and] . . . elements of core al-Qa'ida and ISIS-linked terrorist

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[4] As the Government notes, nationals from these six countries are ineligible for the Visa Waiver Program, which currently allows nationals of thirty-eight countries seeking temporary admission to the United States for tourism or certain business purposes to enter without a visa. *See* 8 U.S.C. § 1187(a). The program excludes nationals of or aliens who have recently visited Iraq or Syria and nationals of or recent visitors to countries designated as state sponsors of terror (Iran, Sudan, and Syria). *See* 8 U.S.C. § 1187(a)(12); *see* U.S. Dep't of State, *U.S. Visa Waiver Program* (Apr. 6, 2016), https://www.dhs.gov/visa-waiver-program (saved as ECF opinion attachment). It also excludes recent visitors to Libya, Somalia, and Yemen. U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (saved as ECF opinion attachment). Thus, nationals from the six countries identified in Section 2(c), like nationals from the vast majority of countries, must undergo the individualized vetting of the regular visa process.

groups remain active in the country." *Id.* § 1(e)(iv). The Second Executive Order further states that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States." *Id.* § 1(h). It provides the following examples: two Iraqi refugees who were convicted of terrorism-related offenses in January 2013, and a naturalized citizen who came to this country as a child refugee from Somalia and who was sentenced for terrorism-related offenses in October 2014. *Id.* The Second Executive Order does not include any examples of individuals from Iran, Libya, Sudan, Syria, or Yemen committing terrorism-related offenses in the United States.

The Second Executive Order clarifies that the suspension of entry applies to foreign nationals who (1) are outside the United States on its effective date of March 16, 2017, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of EO-1—January 27, 2017. *Id.* § 3(a). Section 2(c) does not bar entry of lawful permanent residents, dual citizens traveling under a passport issued by a non-banned country, asylees, or refugees already admitted to the United States. *Id.* § 3(b). The Second Executive Order also includes a provision that permits consular officers, in their discretion, to issue waivers on a case-by-case basis to individuals barred from entering the United States. *Id.* § 3(c).

The Second Executive Order retains some—but not all—of the First Executive Order's refugee provisions. It again suspends USRAP for 120 days and decreases the number of refugee admissions for fiscal year 2017

by more than half, *id.* § 6(a), but it does not include the indefinite ban on Syrian refugees. The Second Executive Order also eliminates the provision contained in EO-1 that mandated preferential treatment of religious minorities seeking refugee status. It explains that this provision "applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion." *Id.* § 1(b)(iv). It further explains that EO-1 was "not motivated by animus toward any religion," but rather was designed to protect religious minorities. *Id.*

Shortly before the President signed EO-2, an unclassified, internal report from the Department of Homeland Security ("DHS") Office of Intelligence and Analysis dated March 2017 was released to the public. *See* J.A. 425-31. The report found that most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States, and concluded that increased screening and vetting was therefore unlikely to significantly reduce terrorism-related activity in the United States. J.A. 426. According to a news article, a separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat. J.A. 424. In a declaration considered by the district court, ten former national security, foreign policy, and intelligence officials who previously served in the White House, State Department, DHS, and Central Intelligence Agency—four of whom were aware of intelligence related to terrorist threats as of January 20, 2017—advised that "[t]here is no national

security purpose for a total ban on entry for aliens from the [Designated Countries]." J.A. 91.

B.

The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump's assumption of office. We now recount certain of those statements.

On December 7, 2015, then-candidate Trump published a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." J.A. 346.[5] That same day, he

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[5] Trump's "Statement on Preventing Muslim Immigration" reads in full:

> (New York, NY) December 7th, 2015,—Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension.

highlighted the statement on Twitter, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.A. 470. And Trump read from the statement at a campaign rally in Mount Pleasant, South Carolina, that evening, where he remarked, "I have friends that are Muslims. They are great people—but they know we have a problem." J.A. 472.

In an interview with CNN on March 9, 2016, Trump professed, "I think Islam hates us," J.A. 516, and "[W]e can't allow people coming into the country who have this hatred," J.A. 517. Katrina Pierson, a Trump spokeswoman, told CNN that "[w]e've allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.A. 518. In a March 22, 2016 interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration, claiming that this proposed ban had received "tremendous support" and stating, "we're having problems with

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> Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.—*Donald J. Trump*

J.A. 346. The district court noted that, as of February 12, 2017, this statement remained on Trump's campaign website. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *4 (D. Md. Mar. 16, 2017). The statement was subsequently removed from the campaign website shortly before the May 8, 2017 oral argument in this case.

the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. "You need surveillance," Trump explained, and "you have to deal with the mosques whether you like it or not." J.A. 522.

Candidate Trump later recharacterized his call to ban Muslims as a ban on nationals from certain countries or territories. On July 17, 2016, when asked about a tweet that said, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," then-candidate Trump responded, "So you call it territories. OK? We're gonna do territories." J.A. 798. He echoed this statement a week later in an interview with NBC's Meet the Press. When asked whether he had "pulled back" on his "Muslim ban," Trump replied, "We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place." J.A. 480. Trump added, "I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." J.A. 481. Trump continued, "Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently." J.A. 481.

On December 19, 2016, following a terrorist attack in Germany, President-Elect Trump lamented the attack on people who were "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terror-

ists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.A. 506. Two days later, when asked whether recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump commented, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful." J.A. 506.

The President gave an interview to the Christian Broadcasting News on January 27, 2017, the same day he issued the First Executive Order. In that interview, the President explained that EO-1 would give preference to Christian refugees: "They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible. . . . " J.A. 461. He found that situation "very, very unfair." J.A. 461. Just before signing EO-1, President Trump stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The following day, former New York City Mayor and presidential advisor Rudolph Giuliani appeared on Fox News and was asked, "How did the President decide the seven countries?" J.A. 508. Giuliani answered, "I'll tell you the whole history of it. So when [the President] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508. Giuliani said he assembled a group

of "expert lawyers" that "focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It's based on places where there [is] substantial evidence that people are sending terrorists into our country." J.A. 508-09.

In response to the Ninth Circuit's decision not to stay enforcement of the nationwide injunction, the President stated at a news conference on February 16, 2017, that he intended to issue a new executive order tailored to that court's decision—despite his belief that the First Executive Order was lawful. *See* J.A. 334. In discussing the Ninth Circuit's decision and his "[e]xtreme vetting" proposal, the President stated, "I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result." J.A. 352. A few days later Stephen Miller, Senior Policy Advisor to the President, explained that the new order would reflect "mostly minor technical differences," emphasizing that it would produce the "same basic policy outcome for the country." J.A. 339. White House Press Secretary Sean Spicer stated, "The principles of the executive order remain the same." J.A. 379. And President Trump, in a speech at a rally in Nashville, Tennessee, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/ (saved as ECF opinion attachment)).

At the March 6, 2017 press conference announcing the Second Executive Order, Secretary of State Rex Tillerson said, "This executive order is a vital measure for strengthening our national security." J.A. 376. That same day, Attorney General Jefferson Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President detailing how weaknesses in our immigration system compromise our nation's security and recommending a temporary pause on entry of nationals from the Designated Countries. Appellants' Br. 8 n.3 (citing Letter from Jefferson B. Sessions III, Attorney Gen., and John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump (Mar. 6, 2017)). In a CNN interview the next day, Secretary Kelly specified that there are probably "13 or 14 countries" that have "questionable vetting procedures," not all of which are Muslim countries or in the Middle East. J.A. 411. He noted that there are "51 overwhelmingly Muslim countries" and rejected the characterization of EO-2 as a "Muslim ban." J.A. 412.

C.

This action was brought by six individuals, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, and three organizations that serve or represent Muslim clients or members.

Four of the individual Plaintiffs—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—allege that EO-2 would impact their immediate family members' ability to obtain visas. J.A. 213-14, 245-52, 305, 308-09, 318-19. Collectively, they claim that Section

2(c) of EO-2, the provision that suspends entry for certain foreign nationals for ninety days, will prolong their separation from their loved ones. *See, e.g.*, J.A. 306. John Doe #1 has applied for a spousal immigration visa so that his wife, an Iranian national, can join him in the United States; the application was approved, and she is currently awaiting her visa interview. J.A. 305. Jane Doe #2, a college student in the United States, has a pending I-130 visa application on behalf of her sister, a Syrian refugee living in Saudi Arabia. J.A. 316, 318-19. Since the filing of the operative Complaint on March 10, 2017, two of Plaintiffs' family members have obtained immigrant visas. The Government informed the district court that Paul Harrison's fiancé secured and collected a visa on March 15, 2017, the day before EO-2 was to take effect. Appellants' Br. 19 n.6 (citing J.A. 711-12, 715). Doe #3's wife secured an immigrant visa on May 1, 2017, and Plaintiffs anticipate that she will arrive in the United States within the next eight weeks. J.A. 819. The remaining two individual Plaintiffs—Muhammed Meteab and Ibrahim Ahmed Mohomed—allege that EO-2 would delay or deny the admission of their family members as refugees. J.A. 214, 249-50, 252, 313-14, 321-22.

Beyond claiming injury to their family relationships, several of the individual Plaintiffs allege that the anti-Muslim message animating EO-2 has caused them feelings of disparagement and exclusion. Doe #1, a scientist who obtained permanent resident status through the National Interest Waiver program for people with extraordinary abilities, references these "anti-Muslim views," worries about his safety in this

country, and contemplates whether he should return to Iran to be with his wife. J.A. 304, 306. Plaintiff Meteab relays that the "anti-Muslim sentiment" motivating EO-2 had led him to feel "isolated and disparaged in [his] community." J.A. 314. He explains that when he is in public with his wife, who wears a hijab, he "sense[s] a lot of hostility from people" and recounts that his nieces, who both wear a hijab, "say that people make mean comments and stare at them for being Muslim." J.A. 314. A classmate "pulled the hijab off" one of his nieces in class. J.A. 314.

Two of the organizational Plaintiffs, the International Refugee Assistance Project and the Hebrew Immigrant Aid Society, primarily assist refugees with the resettlement process. *See* J.A. 210-13, 235-43. These organizations claim that they have already diverted significant resources to dealing with EO-2's fallout, and that they will suffer direct financial injury from the anticipated reduction in refugee cases. J.A. 238, 243, 276-77. They further claim that their clients, who are located in the United States and the Middle East, will be injured by the delayed reunification with their loved ones. J.A. 268, 282-83. The final Plaintiff, the Middle East Studies Association, an umbrella organization dedicated to fostering awareness of the Middle East, asserts that EO-2 will, among other injuries, reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees. J.A. 243-45, 300-03.

D.

Plaintiffs initiated this suit on February 7, 2017, seeking declaratory and injunctive relief against enforce-

ment of the First Executive Order. Plaintiffs claimed that EO-1 violated the Establishment Clause of the First Amendment; the equal protection component of the Due Process Clause of the Fifth Amendment; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-24 (2012); and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2012). They named as Defendants the President, DHS, the Department of State, the Office of the Director of National Intelligence, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence.

On March 10, 2017, four days after the President issued EO-2, Plaintiffs filed the operative Complaint, along with a motion for a TRO and/or preliminary injunction. Plaintiffs sought to enjoin implementation of EO-2 in its entirety, prior to its effective date. In quick succession, the Government responded to the motion, Plaintiffs filed a reply, and the parties appeared for a hearing.

The district court construed the motion as a request for a preliminary injunction, and on March 16, 2017, it granted in part and denied in part that motion. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *1. In its Memorandum Opinion, the district court first found that three individual Plaintiffs (Doe #1, Doe #2, and Doe #3) had standing to bring the claim that Section 2(c) violates the INA's provision prohibiting discrimination on the basis of nationality in the issuance of immigrant visas, 8 U.S.C. § 1152(a)(1)(A). *Id.* at *6.

The court also determined that at least three individual Plaintiffs (Meteab, Doe #1, and Doe #3) had standing to pursue the claim that EO-2 violates the Establishment Clause. *Id.* at *7.

After finding Plaintiffs' claims justiciable, the district court turned to the merits of their claims. The court determined that Plaintiffs are likely to succeed only in part on the merits of their INA claim. *Id.* at *10. It found that Section 2(c) likely violates § 1152(a)(1)(A), but only as to its effective bar on the issuance of *immigrant* visas, because § 1152(a)(1)(A) explicitly applies solely to immigrant visas. To the extent that Section 2(c) prohibits the issuance of non-immigrant visas and bars entry on the basis of nationality, the court found that it was not likely to violate § 1152(a)(1)(A). *Id.* The court did not discuss this claim in addressing the remaining preliminary injunction factors.

The district court next found that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim. *Id.* at *16. It then considered the remaining preliminary injunction requirements, but only as to the Establishment Clause claim: it found that Plaintiffs would suffer irreparable injury if EO-2 were to take effect, that the balance of the equities weighed in Plaintiffs' favor, and that a preliminary injunction was in the public interest. *Id.* at *17. The district court concluded that a preliminary injunction was therefore proper as to Section 2(c) of EO-2 because Plaintiffs' claims centered primarily on that provision's suspension of entry. The court accordingly issued a

nationwide injunction barring enforcement of Section 2(c). *Id.* at *18.

Defendants timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II.

Because the district court enjoined Section 2(c) in its entirety based solely on Plaintiffs' Establishment Clause claim, we need not reach the merits of Plaintiffs' statutory claim under the INA.

In Section 2(c) of EO-2, the President suspended the entry of nationals from the six Designated Countries, pursuant to his power to exclude aliens under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f), and Section 215(a)(1) of the INA, codified at 8 U.S.C. § 1185(a)(1). The Government contends that Section 2(c)'s suspension of entry falls squarely within the "expansive authority" granted to the President by § 1182(f)[6] and § 1185(a)(1).[7] Appellants' Br. 28. Plain-

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[6] Section 1182(f), entitled "Suspension of entry or imposition of restrictions by President," provides in pertinent part that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

[7] Section 1185(a)(1) provides that "[u]nless otherwise ordered by the President, it shall be unlawful[] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject

tiffs, on the other hand, argue that Section 2(c) violates a separate provision of the INA, Section 202(a)(1)(A), codified at 8 U.S.C. § 1152(a)(1)(A), prohibiting discrimination on the basis of nationality "in the issuance of immigrant visas."[8]

The district court determined that Plaintiffs are likely to succeed on their claim under § 1152(a)(1)(A) only in limited part. Because Section 2(c) has the practical effect of halting the issuance of immigrant visas on the basis of nationality, the court reasoned, it is inconsistent with § 1152(a)(1)(A). To that extent—and contrary to the Government's position—the court found that Presidential authority under § 1182(f) and § 1185(a)(1) is cabined by the INA's prohibition on nationality-based discrimination in visa issuance. But the district court's ruling was limited in two important respects. First, because § 1152(a)(1)(A) applies only to the issuance of *immigrant* visas, the district court discerned no conflict between that provision and the application of Section 2(c) to persons seeking *non-immigrant* visas. And second, the district court found that because § 1152(a)(1)(A) governs the issuance of visas rather than actual entry into the United States, it poses no obstacle to enforcement of Section 2(c)'s

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to such limitations and exceptions as the President may prescribe. . . . " 8 U.S.C. § 1185(a)(1).

[8] Section 1152(a)(1)(A) provides, with certain exceptions not relevant here, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).

nationality-based entry bar. The district court summarized as follows:

> Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas. . . . They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Int'l Refugee Assistance Project, 2017 WL 1018235, at *10.

This narrow statutory ruling is not the basis for the district court's broad preliminary injunction enjoining Section 2(c) of EO-2 in all of its applications. Rather, Plaintiffs' constitutional claim, the district court determined, was what justified a nationwide preliminary injunction against any enforcement of Section 2(c). If we were to disagree with the district court that § 1152(a)(1)(A) partially restrains the President's authority under § 1182(f) and § 1185(a)(1), then we would be obliged to consider Plaintiffs' alternative Establishment Clause claim. And, importantly, even if we were to *agree* with the district court's statutory analysis, we still would be faced with the question of whether the scope of the preliminary injunction, which goes beyond the issuance of immigrant visas governed by § 1152(a)(1)(A) to enjoin Section 2(c) in its entirety, can be sustained on the basis of Plaintiffs' Establishment Clause claim.

In light of this posture, we need not address the merits of the district court's statutory ruling. We recognize, of course, the doctrine of constitutional avoidance, which counsels against the issuance of "unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam). But as we have explained, the district court's constitutional ruling was necessary to its decision, and review of that ruling is necessary to ours. Accordingly, we decline to reach the merits of Plaintiffs' claim under § 1152(a)(1)(A). The breadth of the preliminary injunction issued by the district court may be justified if and only if Plaintiffs can satisfy the requirements for a preliminary injunction based on their Establishment Clause claim. We therefore turn to consider that claim.

III.

The Government first asks us to reverse the preliminary injunction on the grounds that Plaintiffs' Establishment Clause claim is non-justiciable. In its view, Plaintiffs have not satisfied the foundational Article III requirements of standing and ripeness, and in any event, the doctrine of consular nonreviewability bars judicial review of their claim. We consider these threshold challenges in turn.

A.

The district court found that at least three individual Plaintiffs—Muhammed Meteab, Doe #1, and Doe #3—have standing to assert the claim that EO-2 violates the Establishment Clause. We review this legal deter-

mination de novo. *Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 n.2 (4th Cir. 2007).

The Constitution's gatekeeping requirement that federal courts may only adjudicate "Cases" or "Controversies," U.S. Const. art. III, § 2, obligates courts to determine whether litigants have standing to bring suit, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). To demonstrate standing and thus invoke federal jurisdiction, a party must establish that "(1) it has suffered an injury in fact, (2) the injury is fairly traceable to the defendants' actions, and (3) it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The parties' core dispute is whether Plaintiffs have suffered a cognizable injury. To establish a cognizable injury, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560); *see also Beck v. McDonald*, 848 F.3d 262, 270-71 (4th Cir. 2017).

In evaluating standing, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *see also Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd by District*

of Columbia v. Heller, 554 U.S. 570 (2008) ("The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."). This means, for purposes of standing, we must assume that Section 2(c) violates the First Amendment's prohibition against governmental "establishment of religion."

"Standing in Establishment Clause cases may be shown in various ways," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011), though as oft-repeated, "the concept of injury for standing purposes is particularly elusive" in this context, *Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). Nevertheless, the Supreme Court and this Circuit have developed a set of rules that guide our review.

To establish standing for an Establishment Clause claim, a plaintiff must have "*personal contact* with the *alleged* establishment of religion." *Id.* at 1086 (emphasis added). A "mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Id.* The Supreme Court has reinforced this principle in recent years: "plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion." *Winn*, 563 U.S. at 129. This "direct harm" can resemble injuries in other contexts. Merchants who suffered economic injury, for instance, had standing to challenge Sunday closing laws as violative of the Establishment Clause. *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961); *Czyzewski v.*

Jevic Holding Corp., 137 S. Ct. 973, 983 (2017) (noting that, in *McGowan*, appellants who were "fined $5 plus costs had standing"). But because Establishment Clause violations seldom lead to "physical injury or pecuniary loss," the standing inquiry has been adapted to also include "the kind of injuries Establishment Clause plaintiffs" are more "likely to suffer." *Suhre*, 131 F.3d at 1086. As such, "noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Id.* "Feelings of marginalization and exclusion are cognizable forms of injury," we recently explained, "particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

Doe #1—who is a lawful permanent resident of the United States, Muslim, and originally from Iran—filed a visa application on behalf of his wife, an Iranian national. Her application has been approved, and she is currently awaiting her consular interview. J.A. 305. If it took effect, EO-2 would bar the entry of Doe #1's wife. Doe #1 explains that because EO-2 bars his wife's entry, it "forces [him] to choose between [his] career and being with [his] wife," and he is unsure "whether to keep working here" as a scientist or to return to Iran. J.A. 306. Doe #1 adds that EO-2 has "created significant fear, anxiety, and insecurity" for

him and his wife. He highlights the "statements that have been made about banning Muslims from entering, and the broader context," and states, "I worry that I may not be safe in this country." J.A. 306; *see also* J.A. 314 (Plaintiff Meteab describing how the "anti-Muslim sentiment motivating" EO-2 has led him to feel "isolated and disparaged in [his] community").

Doe #1 has therefore asserted two distinct injuries stemming from his "personal contact" with the alleged establishment of religion—EO-2. *Suhre*, 131 F.3d at 1086. First, EO-2 will bar his wife's entry into the United States and prolong their separation. And second, EO-2 sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community.

We begin with Doe #1's allegation that EO-2 will prolong his separation from his wife. This Court has found that standing can be premised on a "threatened rather than actual injury," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc), as long as this "threat of injury [is] both real and immediate," *Beck*, 848 F.3d at 277 (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)). The purpose of the longstanding "imminence" requirement, which is admittedly "a somewhat elastic concept," is "to ensure that the alleged injury is not too speculative for Article III purposes —that the injury is '*certainly* impending.'" *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

The Government does not contest that, in some circumstances, the prolonged separation of family mem-

bers can constitute an injury-in-fact. The Government instead argues that Doe #1's claimed injury is speculative and non-imminent, Appellants' Br. 19, such that it is not "legally and judicially cognizable." *Id.* at 18 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). According to the Government, Doe #1 has failed to show that his threatened injury—prolonged separation from his wife—is imminent. It asserts that Doe #1 has offered no reason to believe that Section 2(c)'s "short pause" on entry "will delay the issuance of [his wife's] visa." Appellants' Br. 19.

But this ignores that Section 2(c) appears to operate by design to delay the issuance of visas to foreign nationals. Section 2(c)'s "short pause" on entry effectively halts the issuance of visas for ninety days—as the Government acknowledges, it "would be pointless to issue a visa to an alien who the consular officer already knows is barred from entering the country." Appellants' Br. 32; *see also* Brief for Cato Institute as Amicus Curiae Supporting Appellees 25-28, ECF No. 185 (arguing that Section 2(c) operates as a ban on visa issuance). The Government also cites 8 U.S.C. § 1201(g), which provides in relevant part that "[n]o visa or other documentation shall be issued to an alien if [] it appears to the consular officer . . . that such alien is ineligible to receive a visa or other documentation under section 1182 of this title." *See also* U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016). A ninety-day pause on issuing visas would seem to necessarily inject at least some delay into any pending application's timeline. And in fact, the Government suggests that pending visa applications might not be

delayed, but *denied*. *See* Appellants' Br. 33 (explaining that "when an alien subject to the Order is denied an immigrant visa, . . . he is being denied a visa because he has been validly barred from entering the country"). A denial on such grounds would mean that once the entry suspension period concludes, an alien would have to restart *from the beginning* the lengthy visa application process. What is more, Section 2(c) is designed to "reduce investigative burdens on relevant agencies" to facilitate *worldwide* review of the current procedures for "screening and vetting of foreign nationals." Logically, dedicating time and resources to a global review process will further slow the adjudication of pending applications.

Here, Doe #1 has a pending visa application on behalf of his wife, seeking her admission to the United States from one of the Designated Countries. Prior to EO-2's issuance, Doe #1 and his wife were nearing the end of the lengthy immigrant visa process, as they were waiting for her consular interview to be scheduled. J.A. 305. They had already submitted a petition, received approval of that petition, begun National Visa Center ("NVC") Processing, submitted the visa application form, collected and submitted the requisite financial and supporting documentation to NVC, and paid the appropriate fees. J.A. 305; *see* U.S. Dep't of State, *The Immigrant Visa Process*, https://travel.state.gov/content/visas/en/immigrate/immigrant-process.html (last visited May 14, 2017) (saved as ECF opinion attachment) (diagramming steps of the immigrant-visa application process). If Section 2(c) were in force—restricting the issuance of visas to nationals in the Designated Coun-

tries for ninety days and initiating the worldwide review of existing visa standards—we find a "real and immediate" threat that it would prolong Doe #1's separation from his wife, either by delaying the issuance of her visa or denying her visa and forcing her to restart the application process. *Beck*, 848 F.3d at 277 (quoting *Lebron*, 670 F.3d at 560).

This prolonged family separation is not, as the Government asserts, a remote or speculative possibility. Unlike threatened injuries that rest on hypothetical actions a plaintiff may take "some day," *Lujan*, 504 U.S. at 564, or on a "highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148, the threatened injury here is imminent, sufficiently "real" and concrete, *Spokeo*, 136 S. Ct. at 1549, and would harm Doe #1 in a personal and "particularized" way, *id.* at 1548. The progression of Doe #3's wife's visa application illustrates this. Doe #3's wife received a visa on May 1, 2017, while Section 2(c) was enjoined. If Section 2(c) had been in effect, she would have been ineligible to receive a visa until after the expiration of the ninety-day period. *See* 8 U.S.C. § 1201(g). Put simply, Section 2(c) would have delayed the issuance of Doe #3's wife's visa. This cuts directly against the Government's assertion that it is uncertain whether or how Section 2(c) would affect visa applicants. Clearly Section 2(c) will delay and disrupt pending visa applications.

Even more, flowing from EO-2 is the alleged state-sanctioned message that foreign-born Muslims, a group to which Doe #1 belongs, are "outsiders, not full members of the political community." *Moss*, 683 F.3d

at 607 (quoting *McCreary*, 545 U.S. at 860).[9] Doe #1 explains how the Second Executive Order has caused him to fear for his personal safety in this country and wonder whether he should give up his career in the United States and return to Iran to be with his wife. J.A. 306. This harm is consistent with the "[f]eelings of marginalization and exclusion" injury we recognized in *Moss*. 683 F.3d at 607.

In light of these two injuries, we find that Doe #1 has had "personal contact with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086. Regardless of whether EO-2 actually violates the Establishment Clause's command not to disfavor a particular religion, a merits inquiry explored in Section IV.A, his injuries are on par with, if not greater than, injuries we previously deemed sufficient in this context. *See Moss*, 683 F.3d at 607 (finding Jewish daughter and

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[9] The Government would have us, in assessing standing, delve into whether EO-2 sends a sufficiently religious message such that it violates the Establishment Clause. But this "put[s] the merits cart before the standing horse." *Cooksey*, 721 F.3d at 239 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006)). The question of whether EO-2 "conveys a message of endorsement or disapproval [of religion]" is a merits determination. *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985)). And both parties address it as a merits question in their briefs. Appellants' Br. 48 ("The Order, in contrast, conveys no religious message. . . . "); *id.* at 52 ("Here, the Order does not convey a religious message. . . . "); Appellees' Br. 38 ("The Order's purpose to exclude Muslims conveys the exact same message. . . . "). Because we assume the merits of Plaintiffs' claim in assessing standing, we need not reach the Government's argument on this point.

father who received letter describing public school policy of awarding academic credit for private, Christian religious instruction suffered injury in part because they were made to feel like "'outsiders' in their own community").[10]

The Government attempts to undercut these injuries in several ways. It first frames Plaintiffs' injuries as "stress." Appellants' Br. 23. That minimizes the psychological harm that flows from confronting official action preferring or disfavoring a particular religion and, in any event, does not account for the impact on families. The Government next argues that because the Second Executive Order "directly applies only to aliens abroad from the specified countries," it is "not directly targeted at plaintiffs," who are based in the United States, "in the way that local-or state-government messages are." Appellants' Reply Br. 3. An executive order is of course different than a local Sunday closing law or a Ten Commandments display in a state courthouse, but that does not mean its impact is any less direct. Indeed, because it emanates from the highest elected office in the nation, its impact is arguably felt even more directly by the individuals it affects.

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[10] Plaintiffs' injuries are also consistent with the injuries that other courts have recognized in Establishment Clause cases that do not involve religious displays or prayer. *See Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (recognizing injury stemming from amendment that "condemn[ed] [plaintiff's] religious faith and expose[d] him to disfavored treatment"); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc) (finding "exclusion or denigration on a religious basis within the political community" to be sufficiently concrete injury).

From Doe #1's perspective, the Second Executive Order does not apply to arbitrary or anonymous "aliens abroad." It applies to his wife.

More than abstractly disagreeing with the wisdom or legality of the President's policy decision, Plaintiffs show how EO-2 impacted (and continues to impact) them *personally*. Doe #1 is not simply "roam[ing] the country in search of governmental wrongdoing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982). Rather, he is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life.[11] This case thus bears little resemblance to *Valley Forge*.

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[11] For similar reasons, this case is not, as the Government claims, comparable to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008). In that case, the court found that non-liturgical Protestant chaplains who were part of the Navy's Chaplain Corps lacked standing to bring a claim that the Navy preferred Catholic chaplains in violation of the Establishment Clause. *Id.* at 765. The court stated its holding as follows: "When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown an injury-in-fact to bring an Establishment Clause claim." *Id.* at 764-65. The court repeatedly emphasized that plaintiffs were not themselves affected by the challenged action. *See id.* at 758 ("[T]he plaintiffs do not claim that the Navy actually discriminated against any of them."); *id.* at 760 ("But plaintiffs have conceded that they themselves did not suffer employment discrimination. . . . Rather, they suggest that *other* chaplains suffered discrimination."). In fact, plaintiffs' theory of standing was so expansive that their counsel conceded at oral argument that even the "judges on th[e] panel" would have standing to challenge the

We likewise reject the Government's suggestion that Plaintiffs are seeking to vindicate the legal rights of third parties. The prudential standing doctrine includes a "general prohibition on a litigant's raising another person's legal rights." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This "general prohibition" is not implicated here, however, as Doe #1 has shown that he himself suffered injuries as a result of the challenged Order.[12]

For all of these reasons, we find that Doe #1 has met his burden to establish an Article III injury. We

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allegedly discriminatory conduct. *Id.* at 764. Here, by contrast, Doe #1 *is* directly affected by the government action—both its message and its impact on his family. Thus, contrary to the Government's assertion, Appellants' Br. 24, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it.

[12] The district court here correctly recognized that the Supreme Court has on multiple occasions "reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *5 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (reaching merits where American citizen challenged denial of husband's visa application); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (reaching merits where American scholars challenged denial of temporary nonimmigrant visa to Marxist Belgian journalist)); *see also Mandel*, 408 U.S. at 772 ("Even assuming, arguendo, that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveler's lectures do." (Douglas, J., dissenting)). The Supreme Court's consideration of the merits in these cases suggests, at least at a general level, that Americans have a cognizable interest in the application of immigration laws to their foreign relatives.

further find that Doe #1 has made the requisite showing that his claimed injuries are causally related to the challenged conduct—the Second Executive Order—as opposed to "the independent action of some third party not before the court." *Cooksey*, 721 F.3d at 238 (quoting *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005)). Enjoining enforcement of Section 2(c) therefore will likely redress those injuries. Doe #1 has thus met the constitutional standing requirements with respect to the Establishment Clause claim. And because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

Lastly, the Government asserts that Plaintiffs' Establishment Clause claim is unripe. It argues that under EO-2, Plaintiffs' relatives can apply for a waiver, and unless and until those waiver requests are denied, Plaintiffs' claims are dependent on future uncertainties. When evaluating ripeness, we consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). An action is fit for resolution "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). The "hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." *Lansdowne on the*

Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 199 (4th Cir. 2013) (quoting *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992)).

Our ripeness doctrine is clearly not implicated here. Plaintiffs have brought a facial challenge, alleging that EO-2 violates the Establishment Clause regardless of whether their relatives secure waivers. This legal question is squarely presented for our review and is not dependent on the factual uncertainties of the waiver process. What is more, Plaintiffs will suffer undue hardship, as explained above, were we to require their family members to attempt to secure a waiver before permitting Plaintiffs to challenge Section 2(c). We accordingly find the claim ripe for judicial decision.

B.

In one final justiciability challenge, the Government asserts that consular nonreviewability bars *any* review of Plaintiffs' claim. This Court has scarcely discussed the doctrine, so the Government turns to the District of Columbia Circuit, which has stated that "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). But in the same opinion, the court explained that judicial review was proper in cases involving "claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones." *Id.* at 1163 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986)). This is precisely such a case. More fundamentally, the doctrine of consular non-

reviewability does not bar judicial review of constitutional claims. *See, e.g.*, *Din*, 135 S. Ct. at 2132 (reviewing visa denial where plaintiff asserted due process claim). The Government's reliance on the doctrine is therefore misplaced.

Behind the casual assertion of consular nonreviewability lies a dangerous idea—that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, *see infra* Section IV.A, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake. To the contrary, the Supreme Court has affirmed time and again that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This "duty will sometimes involve the 'resolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). In light of this duty, and having determined that the present case is justiciable, we now proceed to consider whether the district court properly enjoined Section 2(c) of the Second Executive Order.

IV.

A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power" and is "to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola*,

Inc., 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)). For a district court to grant a preliminary injunction, "a plaintiff 'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). The district court found that Plaintiffs satisfied all four requirements as to their Establishment Clause claim, and it enjoined Section 2(c) of EO-2. We evaluate the court's findings for abuse of discretion, *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012), reviewing its factual findings for clear error and its legal conclusions de novo, *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

A.

The district court determined that Plaintiffs are likely to succeed on the merits of their claim that EO-2 violates the Establishment Clause. *Int'l Refugee Assistance Project*, 2017 WL 1018235, at *16. It found that because EO-2 is "facially neutral in terms of religion," *id.* at *13, the test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), governs the constitutional inquiry. And applying the *Lemon* test, the court found that EO-2 likely violates the Establishment Clause. The Government argues that the court erroneously applied the *Lemon* test instead of the more deferential test set

forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). And under *Mandel*, the Government contends, Plaintiffs' claim fails.

1.

We begin by addressing the Government's argument that the district court applied the wrong test in evaluating Plaintiffs' constitutional claim. The Government contends that *Mandel* sets forth the appropriate test because it recognizes the limited scope of judicial review of executive action in the immigration context. Appellants' Br. 42. We agree that *Mandel* is the starting point for our analysis, but for the reasons that follow, we find that its test contemplates the application of settled Establishment Clause doctrine in this case.

In *Mandel*, American university professors had invited Mandel, a Belgian citizen and revolutionary Marxist and professional journalist, to speak at a number of conferences in the United States. 408 U.S. at 756. But Mandel's application for a nonimmigrant visa was denied under a then-existing INA provision that barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism." 8 U.S.C. § 1182(a)(28)(D) (1964). The Attorney General had discretion to waive § 1182(a)(28)(D)'s bar and grant Mandel an individual exception, but declined to do so on the grounds that Mandel had violated the terms of his visas during prior visits to the United States. 408 U.S. at 759. The American professors sued, alleging, among other things, that the denial of Mandel's visa violated their First

Amendment rights to "hear his views and engage him in a free and open academic exchange." *Id.* at 760.

The Supreme Court, citing "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,'" *id.* at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), found that the long-standing principle of deference to the political branches in the immigration context limited its review of plaintiffs' challenge, *id.* at 767. The Court held that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." *Id.* at 770. The Court concluded that the Attorney General's stated reason for denying Mandel's visa—that he had violated the terms of prior visas—satisfied this test.[13] It therefore did not review plaintiffs' First Amendment claim.

Courts have continuously applied *Mandel*'s "facially legitimate and bona fide" test to challenges to individual visa denials. *See Din*, 135 S. Ct. at 2139-40 (Kennedy, J., concurring in the judgment) (applying *Mandel*'s test to challenge to visa denial); *Cardenas v. United States*, 826 F.3d 1164, 1172-73 (9th Cir. 2016) (same); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) (same). Subsequently, in *Fiallo*

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[13] The Court specifically declined to decide "what First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced." *Id.*

v. Bell, 430 U.S. 787 (1977), the Supreme Court applied *Mandel*'s test to a facial challenge to an immigration law, finding "no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. And in a case where plaintiffs brought a constitutional challenge to an immigration law, this Court has found that "we must apply the same standard as the *Fiallo* court and uphold the statute if a 'facially legitimate and bona fide reason' supports [it]." *Johnson*, 647 F.3d at 127.[14] *Mandel* is therefore the starting point for our review.

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[14] In *Johnson*, this Court considered an equal protection challenge to an immigration law. *Id.* at 126-27. Relying on several of our sister circuits, we equated *Mandel*'s "facially legitimate and bona fide" test with rational basis review. *Id.* at 127 (citing *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065-66 (9th Cir. 2003), *as amended* (June 9, 2003); *Wedderburn v. INS*, 215 F.3d 795, 800 (7th Cir. 2000)). But the *Johnson* Court's interpretation is incomplete. Rational basis review does build in deference to the government's reasons for acting, like *Mandel*'s "facially legitimate" requirement, but it does not call for an inquiry into an actor's "bad faith" and therefore does not properly account for *Mandel*'s "bona fide" requirement. Even more, *Johnson* and similar cases applying rational basis review did so in the context of equal protection challenges. *See, e.g.*, *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000). But courts do not apply rational basis review to Establishment Clause challenges, because that would mean dispensing with the purpose inquiry that is so central to Establishment Clause review. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *see also Colorado Christian Univ. v. Weaver*,

But in another more recent line of cases, the Supreme Court has made clear that despite the political branches' plenary power over immigration, that power is still "subject to important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), and that it is the judiciary's responsibility to uphold those limitations. *Chadha*, 462 U.S. at 941 (stating that Congress and the Executive must "cho[ose] a constitutionally permissible means of implementing" their authority over immigration). These cases instruct that the political branches' power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action's constitutionality is in question.

We are bound to give effect to both lines of cases, meaning that we must enforce constitutional limitations on immigration actions while also applying *Mandel*'s deferential test to those actions as the Supreme Court has instructed. For the reasons that follow, however, we find that these tasks are not mutually exclusive, and that *Mandel*'s test still contemplates meaningful judicial review of constitutional challenges in certain, narrow circumstances, as we have here.

To begin, *Mandel*'s test undoubtedly imposes a heavy burden on plaintiffs, consistent with the significant deference we afford the political branches in the immigration context. *See Mathews v. Diaz*, 426 U.S. 67,

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534 F.3d 1245, 1255 n.2 (10th Cir. 2008) (suggesting that rational basis review cannot be used to evaluate an Establishment Clause claim) (citing *Heller*, 554 U.S. 570). We therefore decline to apply *Johnson*'s interpretation of *Mandel*'s "facially legitimate and bona fide" test to this case.

82 (1976) (describing the "narrow standard of [judicial] review of decisions made by the Congress or the President in the area of immigration and naturalization"). The government need only show that the challenged action is "facially legitimate and bona fide" to defeat a constitutional challenge. *Mandel*, 408 U.S. at 770. These are separate and quite distinct requirements. To be "facially legitimate," there must be a valid reason for the challenged action stated on the face of the action. *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in the judgment) (finding visa denial "facially legitimate" where government cited a statutory provision in support of the denial).

And as the name suggests, the "bona fide" requirement concerns whether the government issued the challenged action in good faith. In *Kerry v. Din*, Justice Kennedy, joined by Justice Alito, elaborated on this requirement. *Id.* at 2141.[15] Here, the burden is on the plaintiff. Justice Kennedy explained that where a plaintiff makes "an affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity," courts may "look behind" the challenged action to

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[15] The Ninth Circuit has found that Justice Kennedy's concurrence is the controlling opinion in *Din*. It relied on the Supreme Court's holding in *Marks v. United States*, which stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Cardenas*, 826 F.3d at 1171 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). We agree that Justice Kennedy's opinion sets forth the narrowest grounds for the Court's holding in *Din* and likewise recognize it as the controlling opinion.

assess its "facially legitimate" justification. *Id.* (suggesting that if plaintiff had sufficiently alleged that government denied visa in bad faith, court should inquire whether the government's stated statutory basis for denying the visa was the actual reason for the denial). In the typical case, it will be difficult for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity. *See, e.g.*, *Cardenas*, 826 F.3d at 1173 (applying *Din* and finding that plaintiff who alleged that consular officer refused to consider relevant evidence and acted based on racial bias had failed to make an affirmative showing of bad faith). And absent this affirmative showing, courts must defer to the government's "facially legitimate" reason for the action.

Mandel therefore clearly sets a high bar for plaintiffs seeking judicial review of a constitutional challenge to an immigration action. But although *Mandel*'s "facially legitimate and bona fide" test affords significant deference to the political branches' decisions in this area, it does not completely insulate those decisions from *any* meaningful review. Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action. In other words, *Mandel*'s requirement that an immigration action be "bona fide" may in some instances compel more searching judicial review. Plaintiffs ask this Court to engage in such searching review

here under the traditional Establishment Clause test, and we therefore turn to consider whether such a test is warranted.

We start with *Mandel*'s requirement that the challenged government action be "facially legitimate." EO-2's stated purpose is "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." EO-2, Preamble. We find that this stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry. EO-2 therefore satisfies *Mandel*'s first requirement. Absent allegations of bad faith, our analysis would end here in favor of the Government. But in this case, Plaintiffs have alleged that EO-2's stated purpose was given in bad faith. We therefore must consider whether they have made the requisite showing of bad faith.

As noted, Plaintiffs must "plausibly allege[] with sufficient particularity" that the reason for the government action was provided in bad faith. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Plaintiffs here claim that EO-2 invokes national security in bad faith, as a pretext for what really is an anti-Muslim religious purpose. Plaintiffs point to ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and included a preference for religious

minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which President Trump and his advisors described as having the same policy goals as EO-1. *See, e.g.*, J.A. 339, 346, 370, 379, 403, 470, 472, 480, 481, 506, 508, 516-18, 522, 798. Plaintiffs also point to the comparably weak evidence that EO-2 is meant to address national security interests, including the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity.

Based on this evidence, we find that Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the "facially legitimate" reason proffered by the government is not "bona fide," we no longer defer to that reason and instead may "look behind" EO-2. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment).

Since Justice Kennedy's concurrence in *Din*, no court has confronted a scenario where, as here, plaintiffs have plausibly alleged with particularity that an immigration action was taken in bad faith. We therefore have minimal guidance on what "look[ing] behind" a challenged immigration action entails. *See id.* In addressing this issue of first impression, the Government does not propose a framework for this inquiry. Rather, the Government summarily asserts that because EO-2 states that it is motivated by national

security interests, it therefore satisfies *Mandel*'s test. But this only responds to *Mandel*'s "facially legitimate" requirement—it reads out *Mandel*'s "bona fide" test altogether. Plaintiffs, for their part, suggest that we review their claim using our normal constitutional tools. And in the Establishment Clause context, our normal constitutional tool for reviewing facially neutral government actions is the test in *Lemon v. Kurtzman*.

We find for several reasons that because Plaintiffs have made an affirmative showing of bad faith, applying the *Lemon* test to analyze EO-2's constitutionality is appropriate. First, as detailed above, the Supreme Court has unequivocally stated that the political branches' immigration actions are still "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also Chadha*, 462 U.S. at 941-42. The constitutional limitation in this case is the Establishment Clause, and this Court's duty to uphold the Constitution even in the context of a presidential immigration action counsels in favor of applying our standard constitutional tool. Second, that Plaintiffs have satisfied *Mandel*'s heavy burden to plausibly show that the reason for the challenged action was proffered in bad faith further supports the application of our established constitutional doctrine. The deferential framework set forth in *Mandel* is based in part on general respect for the political branches' power in the immigration realm. Once plaintiffs credibly call into question the political branches' motives for exercising that power, our reason for deferring is severely undermined. In the rare case where plaintiffs plausibly allege bad faith with particularity, more meaningful review—in the

form of constitutional scrutiny—is proper. And third, in the context of this case, there is an obvious symmetry between *Mandel*'s "bona fide" prong and the constitutional inquiry established in *Lemon*. Both tests ask courts to evaluate the government's purpose for acting.

Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine. Applying this doctrine harmonizes our duty to engage in the substantial deference required by *Mandel* and its progeny with our responsibility to ensure that the political branches choose constitutionally permissible means of exercising their immigration power. We therefore proceed to "look behind" EO-2 using the framework developed in *Lemon* to determine if EO-2 was motivated by a primarily religious purpose, rather than its stated reason of promoting national security.

2.

To prevail under the *Lemon* test, the Government must show that the challenged action (1) "ha[s] a secular legislative purpose," (2) that "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) that it does "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674 (1970)) (citation omitted). The Government must satisfy all three prongs of *Lemon* to defeat an Establishment Clause challenge.

Edwards v. Aguillard, 482 U.S. 578, 583 (1987). The dispute here centers on *Lemon*'s first prong.

In the Establishment Clause context, "purpose matters." *McCreary*, 545 U.S. at 866 n.14. Under the *Lemon* test's first prong, the Government must show that the challenged action "ha[s] a secular legislative purpose." *Lemon*, 403 U.S. at 612. Accordingly, the Government must show that the challenged action has a secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)). The government cannot meet this requirement by identifying *any* secular purpose for the challenged action. *McCreary*, 545 U.S. at 865 n.13 (noting that if any secular purpose sufficed, "it would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action"). Rather, the government must show that the challenged action's *primary* purpose is secular. *Edwards*, 482 U.S. at 594 (finding an Establishment Clause violation where the challenged act's "primary purpose . . . is to endorse a particular religious doctrine," notwithstanding that the act's stated purpose was secular).

When a court considers whether a challenged government action's primary purpose is secular, it attempts to discern the "official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. The court acts as a reasonable, "objective observer," taking into account "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* (quoting *Santa Fe*, 530 U.S. at 308). It also considers the action's "historical context" and "the specific sequence of events leading to [its] passage." *Edwards*, 482 U.S. at 595. And as a reasonable observer, a court has a "reasonable memor[y]," and it cannot "'turn a blind eye to the context in which [the action] arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315).

The evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious. Then-candidate Trump's campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a "Statement on Preventing Muslim Immigration," in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on" and remarked, "[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in

Jihad, and have no sense of reason or respect for human life." J.A. 346. In a March 9, 2016 interview, Trump stated that "Islam hates us," J.A. 516, and that "[w]e can't allow people coming into this country who have this hatred," J.A. 517. Less than two weeks later, in a March 22 interview, Trump again called for excluding Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 522. And on December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.A. 506.

As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion. On July 17, 2016, in response to a tweet stating, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," Trump said, "So you call it territories. OK? We're gonna do territories." J.A. 798. One week later, Trump asserted that entry should be "immediately suspended[ed] . . . from any nation that has been compromised by terrorism." J.A. 480. When asked whether this meant he was "roll[ing]back" his call for a Muslim ban, he said his plan was an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.A. 481.

Significantly, the First Executive Order appeared to take this exact form, barring citizens of seven predominantly Muslim countries from entering the United States. And just before President Trump signed EO-1

on January 27, 2017, he stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 403. The next day, presidential advisor and former New York City Mayor Giuliani appeared on Fox News and asserted that "when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" J.A. 508.

Shortly after courts enjoined the First Executive Order, President Trump issued EO-2, which the President and members of his team characterized as being substantially similar to EO-1. EO-2 has the same name and basic structure as EO-1, but it does not include a preference for religious-minority refugees and excludes Iraq from its list of Designated Countries. EO-2, § 1(e). It also exempts certain categories of nationals from the Designated Countries and institutes a waiver process for qualifying individuals. EO-2, § 3(b), (c). Senior Policy Advisor Miller described the changes to EO-2 as "mostly minor technical differences," and said that there would be "the same basic policy outcomes for the country." J.A. 339. White House Press Secretary Spicer stated that "[t]he principles of the [second] executive order remain the same." J.A. 379. And President Trump, in a speech at a rally, described EO-2 as "a watered down version of the first order." Appellees' Br. 7 (citing Reilly, *supra*). These statements suggest that like EO-1, EO-2's purpose is to effectuate the promised Muslim ban, and that its changes from EO-1 reflect an effort to help it survive judicial scrutiny, rather than to avoid

targeting Muslims for exclusion from the United States.

These statements, taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States. The statements also reveal President Trump's intended means of effectuating the ban: by targeting majority-Muslim nations instead of Muslims explicitly. And after courts enjoined EO-1, the statements show how President Trump attempted to preserve its core mission: by issuing EO-2—a "watered down" version with "the same basic policy outcomes." J.A. 339. These statements are the exact type of "readily discoverable fact[s]" that we use in determining a government action's primary purpose. *McCreary*, 545 U.S. at 862. They are explicit statements of purpose and are attributable either to President Trump directly or to his advisors. We need not probe anyone's heart of hearts to discover the purpose of EO-2, for President Trump and his aides have explained it on numerous occasions and in no uncertain terms. *See Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003) ("Besides, no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the [government actor's] purpose."). EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Mus-

lim ban and EO-2 itself.[16] *See McCreary*, 545 U.S. at 866 (rejecting notion that court could consider only "the latest news about the last in a series of governmental actions, however close they may all be in time and subject"). The reasonable observer could easily connect these statements to EO-2 and understand that its primary purpose appears to be religious, rather than secular.

The Government argues, without meaningfully addressing Plaintiffs' proffered evidence, that EO-2's primary purpose is in fact secular because it is facially neutral and operates to address the risks of potential terrorism without targeting any particular religious group. Appellants' Br. 42-44. That EO-2's stated objective is religiously neutral is not dispositive; the entire premise of our review under *Lemon* is that even facially neutral government actions can violate the Establishment Clause. *See Lemon*, 403 U.S. at 612 (recognizing that "a law 'respecting' . . . the establishment of religion[] is not always easily identifiable as one," and creating a three-part test for discerning when a facially neutral law violates the Establishment Clause); *see also Santa Fe*, 530 U.S. at 315 ("Our examination [under *Lemon*'s purpose prong] . . . need not stop at an analysis of the text of the policy.").

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[16] We reject the government's contentions that none of these statements "in substance corresponds to [Section 2(c)]," Appellants' Br. 52, and that Section 2(c) "bears no resemblance to a 'Muslim ban,'" *id.* at 53. These statements show that President Trump intended to effectuate his proposed Muslim ban by targeting predominantly Muslim nations, rather than Muslims explicitly. Section 2(c) does precisely that.

We therefore reject the Government's suggestion that EO-2's facial neutrality might somehow fully answer the question of EO-2's primary purpose.[17]

The Government's argument that EO-2's primary purpose is related to national security, Appellants' Br. 43-44, is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, J.A. 397, and that those agencies only offered a national

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[17] Plaintiffs suggest that EO-2 is not facially neutral, because by directing the Secretary of Homeland Security to collect data on "honor killings" committed in the United States by foreign nationals, EO-2 incorporates "a stereotype about Muslims that the President had invoked in the months preceding the Order." Appellees' Br. 5, 7; *see* J.A. 598 (reproducing Trump's remarks in a September 2016 speech in Arizona in which he stated that applicants from countries like Iraq and Afghanistan would be "asked their views about honor killings," because "a majority of residents [in those countries] say that the barbaric practice of honor killings against women are often or sometimes justified"). Numerous amici explain that invoking the specter of "honor killings" is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric. *See, e.g.*, Brief for New York University as Amicus Curiae Supporting Appellees 21, ECF No. 82-1; Brief for Muslim Justice League, et al., as Amici Curiae Supporting Appellees 17-18, ECF No. 152-1; Brief for History Professors and Scholars as Amici Curiae Supporting Appellees 2-3, ECF No. 154-1; Brief for Constitutional Law Scholars as Amici Curiae Supporting Appellees 19 n.3, ECF No. 173-1; Brief for Members of the Clergy, et al., as Amici Curiae Supporting Appellees 13, ECF No. 179-1. The Amici Constitutional Law Scholars go so far as to call the reference to honor killings "anti-Islamic dog-whistling." Brief for Constitutional Law Scholars 19 n.3. We find this text in EO-2 to be yet another marker that its national security purpose is secondary to its religious purpose.

security rationale after EO-1 was enjoined. Furthermore, internal reports from DHS contradict this national security rationale, with one report stating that "most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." J.A. 426. According to former National Security Officials, Section2(c) serves "no legitimate national security purpose," given that "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years" and that there is no evidence of any new security risks emanating from these countries. Corrected Brief for Former National Security Officials as Amici Curiae Supporting Appellees 5-8, ECF No. 126-1.[18] Like the district court, we think this strong evidence that any national security justification for EO-2 was secondary to its primary religious purpose and was offered as more of a "litigating position" than as the actual purpose of EO-2. *See McCreary*, 545 U.S. at 871 (describing the government's "new statements of purpose . . . as a litigating position" where they were offered to explain the third iteration of a previously enjoined religious display). And EO-2's text does little to bolster any national security rationale: the only examples it provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis—Iraq is not a designated country in EO-2—and a Somalian refugee who

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[18] A number of amici were current on the relevant intelligence as of January 20, 2017. *Id.* at 9.

entered the United States as a child and was radicalized here as an adult. EO-2, § 1(h). The Government's asserted national security purpose is therefore no more convincing as applied to EO-2 than it was to EO-1.

Relatedly, the Government argues that EO-2's operation "confirms its stated purpose." Appellants' Br. 43. "[I]t applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion." *Id.* In support of its argument that EO-2 does not single out Muslims, the Government notes that these six countries are either places where ISIS has a heavy presence (Syria), state sponsors of terrorism (Iran, Sudan, and Syria), or safe havens for terrorists (Libya, Somalia, and Yemen). Appellants' Br. 5-6. The Government also points out that the six Designated Countries represent only a small proportion of the world's majority-Muslim nations, and EO-2 applies to everyone in those countries, even non-Muslims. *Id.* at 44. This shows, the Government argues, that EO-2's primary purpose is secular. The trouble with this argument is that EO-2's practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from the United States. And that EO-2 is underinclusive by targeting only a small percentage of the world's majority-Muslim nations and overinclusive for targeting all citizens, even non-Muslims, in the Designated Countries, is not responsive to the purpose inquiry. This evidence might be relevant to our analysis under *Lemon*'s second prong, which asks whether a government act has the primary

effect of endorsing or disapproving of religion, *see Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), but it does not answer whether the government acted with a primarily religious purpose to begin with. If we limited our purpose inquiry to review of the operation of a facially neutral order, we would be caught in an analytical loop, where the order would always survive scrutiny. It is for this precise reason that when we attempt to discern purpose, we look to more than just the challenged action itself. And here, when we consider the full context of EO-2, it is evident that it is likely motivated primarily by religion. We do not discount that there may be a national security concern motivating EO-2; we merely find it likely that any such purpose is secondary to EO-2's religious purpose.

The Government separately contends that our purpose inquiry should not extend to "extrinsic evidence" that is beyond EO-2's relevant context. Appellants' Br. 45. The Government first argues that we should not look beyond EO-2's "text and operation." *Id.* at 45-46. But this is clearly incorrect, as the Supreme Court has explicitly stated that we review more than just the face of a challenged action. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("[O]ur [Establishment Clause] analysis does not end with the text of the statute at issue.")

(citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534).[19]

The Government next argues that even if we do look beyond EO-2 itself, under *McCreary*, we are limited to considering only "the operative terms of governmental action and official pronouncements," Appellants' Br. 46, which we understand to mean only EO-2 itself and a letter signed by the Attorney General and the Secre-

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[19] The Government separately suggests that we should limit our review to EO-2's text and operation based on "the Constitution's structure and its separation of powers," and the "'presumption of regularity' that attaches to all federal officials' actions." Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926)). In support of this point, the Government relies on pre-*McCreary* cases discussing, variously, judicial deference to an executive official's decision to deport an alien who had violated the terms of his admission to the United States, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), the President's absolute immunity from damages liability based on his or her official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), and the presumptive privilege we afford a President's conversations and correspondence, *United States v. Nixon*, 418 U.S. 683, 708 (1974). These cases suggest that in certain circumstances, we insulate the President and other executive officials from judicial scrutiny in order to protect and promote the effective functioning of the executive branch. But these cases do not circumscribe our review of Establishment Clause challenges or hold that when a President's official acts violate the Constitution, the acts themselves are immune from judicial review. We find no support in this line of cases for the Government's argument that our review of EO-2's context is so limited. In fact, the Supreme Court has suggested quite the opposite. *See Zadvydas*, 533 U.S. at 695 ("Executive and Legislative Branch decisionmaking . . . power is subject to important constitutional limitations." (citing *Chadha*, 462 U.S. at 941-42)).

tary of State that largely echoes EO-2's text, *id.* at 8 n.3 (citing Letter, *supra*). We find no support for this view in *McCreary*. The *McCreary* Court considered "the traditional external signs that show up in the 'text, legislative history, and implementation of the [challenged action],'" 545 U.S. at 862 (quoting *Santa Fe*, 530 U.S. at 308), but it did not limit other courts' review to those particular terms. *Id.* Nor did it make such an artificial distinction between "official" and "unofficial" context. Rather, it relied on principles of "common sense" and the "reasonable observer[']s . . . reasonable memor[y]" to cull the relevant context surrounding the challenged action. *Id.* at 866. The Government would have us abandon this approach in favor of an unworkable standard that is contrary to the well-established framework for considering the context of a challenged government action.

And finally, the Government argues that even if we could consider unofficial acts and statements, we should not rely on campaign statements. Appellants' Br. 49. Those statements predate President Trump's constitutionally significant "transition from private life to the Nation's highest public office," and as such, they

are less probative than official statements, the Government contends. *Id.* at 51.[20] We recognize that in many cases, campaign statements may not reveal all that much about a government actor's purpose. But we decline to impose a bright-line rule against considering campaign statements, because as with any evidence, we must make an individualized determination as to a statement's relevancy and probative value in light of all the circumstances. The campaign state-

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[20] The government also suggests that we can never rely on private communications to impute an improper purpose to a government actor. *See, e.g.*, *Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d Cir. 2004) (limiting its review to statements made by the elected officials who oversaw the government action). But this is incorrect. These cases merely establish that the motives of people not involved in the decisionmaking process cannot *alone* evince the government's motive. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not *direct* evidence of discrimination." (emphasis added)). But when those statements reveal something about the government's purpose, they are certainly part of the evidence we review for purpose. In *McCreary*, the Court noted that a pastor had delivered a religious message at the ceremony for the challenged religious display. 545 U.S. at 869. Based on this and other evidence of purpose, the Court concluded that "[t]he reasonable observer could only think that the [government] meant to emphasize and celebrate the [display's] religious message." *Id.* In any event, none of these cases contemplate the situation here, where the private speaker and the government actor are one and the same. We need not impute anyone's purpose to anyone else, for the same person has espoused these intentions all along. The distinction between candidate and elected official is thus an artificial one where the inquiry is only whether the reasonable observer would understand the candidate's statements to explain the purpose of his actions once elected.

ments here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action. *See Glassroth*, 335 F.3d at 1297 (reviewing an elected judge's campaign materials that proclaimed him the "Ten Commandment's Judge" as part of its inquiry into the constitutionality of a Ten Commandments display he installed); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (considering facially neutral campaign statements related to bussing in an equal protection challenge); *California v. United States*, 438 U.S. 645, 663-64 (1978) (referring to candidates' political platforms when considering the Reclamation Act of 1902); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that in the equal protection context, "[w]hen there is [] proof that a discriminatory purpose has been a motivating factor in the decision," a court may consider "contemporary statements by members of the decisionmaking body").

Just as the reasonable observer's "world is not made brand new every morning," *McCreary*, 545 U.S. at 866, nor are we able to awake without the vivid memory of these statements. We cannot shut our eyes to such evidence when it stares us in the face, for "there's none so blind as they that won't see." Jonathan Swift, *Polite Conversation* 174 (Chiswick Press ed., 1892). If and when future courts are confronted with campaign or other statements proffered as evidence of governmental purpose, those courts must similarly determine, on a case-by-case basis, whether such statements are

probative evidence of governmental purpose. Our holding today neither limits nor expands their review.[21]

The Government argues that reviewing campaign statements here would encourage scrutiny of all religious statements ever made by elected officials, even remarks from before they assumed office. Appellants' Br. 49-50. But our review creates no such sweeping implications, because as the Supreme Court has counseled, our purpose analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266; *see also Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one. . . . "). Just as a reasonable observer would not understand general statements of religious conviction to inform later government action, nor would we look to such statements as evidence of purpose. A person's particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause—rarely, if ever, will such evidence reveal anything about that person's actions once in office. For a past statement to be relevant to the government's purpose, there must be a substantial, specific connection between it and the challenged government action. And here, in this highly unique set of circumstances, there is a direct link between the President's numerous

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[21] This finding comports with the *McCreary* Court's observation that "past actions [do not] forever taint" a government action, 545 U.S. at 873-74. Whether a statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement.

campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more." J.A. 370.

For similar reasons, we reject the Government's argument that our review of these campaign statements will "inevitably 'chill political debate during campaigns.'" Appellants' Br. 50 (quoting *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995)). Not all—not even most—political debate will have any relevance to a challenged government action. Indeed, this case is unique not because we are considering campaign statements, but because we have such directly relevant and probative statements of government purpose at all. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) (observing that government actors "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate"). To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.

Lastly, the Government contends that we are ill-equipped to "attempt[] to assess what campaign statements reveal about the motivation for later action." Appellants' Br. 50. The Government argues that to do so would "mire [us] in a swamp of unworkable litigation," *id.* (quoting Amended Order, *Washington v. Trump*, No. 17-35105, slip op. at 13 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of reconsid-

eration en banc)), and "forc[e us] to wrestle with intractable questions," such as "the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative." *Id.* But discerning the motives behind a challenged government action is a well-established part of our purpose inquiry. *McCreary*, 545 U.S. at 861 ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine." (citations omitted)). As part of this inquiry, courts regularly evaluate decisionmakers' statements that show their purpose for acting. *See, e.g.*, *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801 (10th Cir. 2009) (considering news reports quoting county commissioners who described both their determination to keep challenged religious display at issue and the strength of their religious beliefs); *Glassroth*, 355 F.3d at 1297 (reviewing elected judge's campaign materials for evidence of his purpose in installing religious display); *Brown v. Gilmore*, 258 F.3d 265, 277 (4th Cir. 2001) (reviewing state legislators' statements in discerning purpose of statute challenged under the Establishment Clause); *see also Edwards*, 482 U.S. at 586-87 (looking to statute's text together with its sponsor's public comments to discern its purpose). And the purpose inquiry is not limited to Establishment Clause challenges; we conduct this analysis in a variety of contexts. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down federal statute based in part on "strong evidence" that "the congressional purpose [was] to influence or interfere

with state sovereign choices about who may be married"); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-80 (1979) (upholding public hiring preferences based in part on finding that government had not created preferences with purpose of discriminating on the basis of sex); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, No. 16-833, 2017 WL 2039439 (U.S. May 15, 2017) (concluding that challenged voting restrictions were unconstitutional because they were motivated by racially discriminatory intent). We therefore see nothing "intractable" about evaluating a statement's probative value based on the identity of the speaker and how specifically the statement relates to the challenged government action, for this is surely a routine part of constitutional analysis. And this analysis is even more straightforward here, because we are not attempting to discern motive from many legislators' statements, as in *Brown*, but rather are looking primarily to one person's statements to discern that person's motive for taking a particular action once in office.

The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it

must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.

EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails *Lemon*'s purpose prong in violation of the Establishment Clause.[22] Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

B.

Because we uphold the district court's conclusion that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim, we next consider

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[22] What is more, we think EO-2 would likely fail any purpose test, for whether religious animus motivates a government action is a fundamental part of our Establishment Clause inquiry no matter the degree of scrutiny that applies. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (upholding town's legislative prayer policy in part because "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 696 (1989) (finding that the challenged statute satisfied *Lemon*'s purpose prong in part because "there is no allegation that [it] was born of animus"); *Lynch*, 465 U.S. at 673 (stating that the Establishment Clause "forbids hostility toward any [religion]"); *see also* Brief for Constitutional Law Scholars 6-11. There is simply too much evidence that EO-2 was motivated by religious animus for it to survive any measure of constitutional review.

whether Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 22; *Musgrave*, 553 F.3d at 298. As we have previously recognized, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190 (4th Cir. 2013) (en banc) (quoting *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 471 (D. Md. 2011)). Accordingly, our finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the absence of an injunction, they will suffer irreparable harm.

Indeed, the Supreme Court has stated in no uncertain terms that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). Though the *Elrod* Court was addressing freedom of speech and association, our sister circuits have interpreted it to apply equally to Establishment Clause violations. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986). We agree with these courts that because of

"the inchoate, one-way nature of Establishment Clause violations," they create the same type of immediate, irreparable injury as do other types of First Amendment violations. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303; *see also id.* ("[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place. . . . "). We therefore find that Plaintiffs are likely to suffer irreparable harm if Section 2(c) of EO-2 takes effect.

C.

Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This is because "courts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937)). As the district court did, we consider the balance of the equities and the public interest factors together.

The Government first contends that "the injunction causes [it] direct, irreparable injury" that outweighs the irreparable harm to Plaintiffs because "'no governmental interest is more compelling than the security of the Nation.'" Appellants' Br. 54 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). When it comes to national security, the Government argues, the judicial

branch "should not second-guess" the President's "'[p]redictive judgment[s].'" Appellants' Br. 55 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)). The Government further argues that the injunction causes institutional injury, because according to two single-Justice opinions, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The Government contends that this principle applies here because the President "represents the people of all 50 states." Appellants' Reply Br. 25.

At the outset, we reject the notion that the President, because he or she represents the entire nation, suffers irreparable harm whenever an executive action is enjoined. This Court has held that the Government is "in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." *Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). "If anything," we said, "the system is improved by such an injunction." *Id.* (quoting *Giovani Carandola*, 303 F.3d at 521). Because Section 2(c) of EO-2 is likely unconstitutional, allowing it to take effect would therefore inflict the greater institutional injury. And we are not persuaded that the general deference we afford the political branches ought to nevertheless tip the equities in the Government's favor, for even the President's

actions are not above judicial scrutiny, and especially not where those actions are likely unconstitutional. *See Zadvydas*, 533 U.S. at 695; *Chadha*, 462 U.S. at 941-42.

We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries. *See United States v. Robel*, 389 U.S. 258, 264 (1967) ("Th[e] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . [O]ur country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). National security may be the most compelling of government interests, but this does not mean it will always tip the balance of the equities in favor of the government. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (agreeing with the dissent that the government's "authority and expertise in [national security and foreign relations] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals" (quoting *id.* at 61 (Breyer, J., dissenting))). A claim of harm to national security must still outweigh the competing claim of injury. Here and elsewhere, the Government would

have us end our inquiry without scrutinizing either Section 2(c)'s stated purpose or the Government's asserted interests, but "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history," *Patrolmen's Benevolent Ass'n of New York v. City of New York*, 310 F.3d 43, 53-54 (2d. Cir. 2002) (citing *Korematsu v. United States*, 323 U.S. 214, 223 (1944)), and is incompatible with our duty to evaluate the evidence before us.

As we previously determined, the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country. We remain unconvinced that Section 2(c) has more to do with national security than it does with effectuating the President's promised Muslim ban. We do not discount that EO-2 may have some national security purpose, nor do we disclaim that the injunction may have some impact on the Government. But our inquiry, whether for determining Section 2(c)'s primary purpose or for weighing the harm to the parties, is one of balance, and on balance, we cannot say that the Government's asserted national security interest outweighs the competing harm to Plaintiffs of the likely Establishment Clause violation.

For similar reasons, we find that the public interest counsels in favor of upholding the preliminary injunction. As this and other courts have recognized, upholding the Constitution undeniably promotes the public interest. *Giovani Carandola*, 303 F.3d at 521 ("[U]pholding constitutional rights surely serves the public interest.");

see also Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002))); *Dayton Area Visually Impaired Pers., Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties."). These cases recognize that when we protect the constitutional rights of the few, it inures to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large.

When the government chooses sides on religious issues, the "inevitable result" is "hatred, disrespect and even contempt" towards those who fall on the wrong side of the line. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Improper government involvement with religion "tends to destroy government and to degrade religion," *id.*, encourage persecution of religious minorities and nonbelievers, and foster hostility and division in our pluralistic society. The risk of these harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group. "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963)

(Goldberg, J. concurring). We therefore conclude that enjoining Section 2(c) promotes the public interest of the highest order. And because Plaintiffs have satisfied all the requirements for securing a preliminary injunction, we find that the district court did not abuse its discretion in enjoining Section 2(c) of EO-2.

V.

Lastly, having concluded that Plaintiffs are entitled to a preliminary injunction, we address the scope of that injunction. The Government first argues that the district court erred by enjoining Section 2(c) nationwide, and that any injunctive relief should be limited solely to Plaintiffs.

It is well-established that "district courts have broad discretion when fashioning injunctive relief." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). Nevertheless, "their powers are not boundless." *Id.* The district court's choice of relief "should be carefully addressed to the circumstances of the case," *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts may issue nationwide injunctions consistent with these principles. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992).

The district court here found that a number of factors weighed in favor of a nationwide injunction, and we

see no error. First, Plaintiffs are dispersed throughout the United States. *See* J.A. 263, 273; *see also Richmond Tenants Org.*, 956 F.2d at 1308-09 (upholding nationwide injunction where challenged conduct caused irreparable harm in myriad jurisdictions across the country). Second, nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that "the immigration laws of the United States should be enforced vigorously and *uniformly*." *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (quoting Immigration Reform and Control Act of 1996, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384); *see also Arizona v. United States*, 132 S. Ct. 2492, 2502 (2015) (describing the "comprehensive and unified system" of "track[ing] aliens within the Nation's borders"). And third, because Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications. Its continued enforcement against similarly situated individuals would only serve to reinforce the "message" that Plaintiffs "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). For these reasons, we find that the district court did not abuse its discretion in concluding that a nationwide injunction was "necessary to provide complete relief." *Madsen*, 512 U.S. at 778.

Finally, the Government argues that the district court erred by issuing the injunction against the President himself. Appellants' Br. 55 (citing *Mississippi v.*

Johnson, 71 U.S. (4 Wall.) 475, 501 (1866) (finding that a court could not enjoin the President from carrying out an act of Congress)). We recognize that "in general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (opinion of O'Connor, J.) (quoting *Johnson*, 71 U.S. at 501), and that a "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows," *id.* at 802. In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself. We therefore lift the injunction as to the President only. The court's preliminary injunction shall otherwise remain fully intact.

To be clear, our conclusion does not "in any way suggest[] that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). Even though the President is not "directly bound" by the injunction, we "assume it is substantially likely that the President . . . would abide by an authoritative interpretation" of Section 2(c) of the Second Executive Order. *Id.* at 803 (opinion of O'Connor, J.).

VI.

For all of these reasons, we affirm in part and vacate in part the preliminary injunction awarded by the district court. We also deny as moot Defendants' motion for a stay pending appeal.

AFFIRMED IN PART, VACATED IN PART

TRAXLER, Circuit Judge, concurring in the judgment:

I concur in the judgment of the majority insofar as it affirms the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the Executive Order against the officers, agents, and employees of the Executive Branch of the United States, and anyone acting under their authorization or direction, who would attempt to enforce it, because it likely violates the Establishment Clause of the United States Constitution. I also concur in the judgment of the majority to lift the injunction as to President Trump himself.

BARBARA MILANO KEENAN, Circuit Judge, with whom JUDGE THACKER joins except as to Part II.A.i., concurring in part and concurring in the judgment:

I concur in the majority opinion's analysis with respect to its conclusions: (1) that the stated "national security purpose" of the Second Executive Order [1] likely fails *Mandel*'s "bona fide" test and violates the Establishment Clause, *see Kleindienst v. Mandel*, 408 U.S. 753 (1972); and (2) that the record before us supports the award of a nationwide injunction.[2] I write separately to express my view that although the plaintiffs are unlikely to succeed on the merits of their claim under Section 1152(a)(1)(A), their request for injunctive relief under the INA nevertheless is supported by

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[1] Exec. Order No. 13,780, *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[2] Based on my view that the Second Executive Order does not satisfy the threshold requirement of 8 U.S.C. § 1182(f) for exercise of a president's authority under that statute, I would conclude that the Second Executive Order is not "facially legitimate" within the meaning of *Mandel*, 408 U.S. at 770. Nevertheless, I join in the majority opinion's holding that the plaintiffs are likely to succeed on the merits of their Establishment Clause claim, based on my further conclusion that the Second Executive Order likely fails *Mandel*'s "bona fide" test. In reaching this conclusion, I additionally note that I do not read the majority opinion as holding that a plausible allegation of bad faith alone would justify a court's decision to look behind the government's proffered justification for its action. Rather, in accordance with Justice Kennedy's concurrence in *Din*, a plaintiff must make an affirmative showing of bad faith to satisfy the "bona fide" requirement of *Mandel*. *See Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment).

the failure of Section 2(c) to satisfy the threshold requirement of Section 1182(f) for the President's lawful exercise of authority.[3]

I.

As an initial matter, I conclude that John Doe #1 has standing to raise a claim that the Second Executive Order violates the INA.[4] To establish standing under Article III, a plaintiff must show that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff seeking "to enjoin a future action must demonstrate that he is immediately in danger of sustaining some direct injury as the result" of the challenged conduct, which threat of injury is "both real and immediate." *Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) (internal quotation marks omitted) (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)).

Prolonged separation from one's family members constitutes a cognizable injury-in-fact. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other*

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[3] We may consider this facial deficiency not raised by the plaintiffs because this defect is apparent from the record. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (explaining that the Court may affirm on any grounds apparent from the record).

[4] Because only one plaintiff must have standing for the Court to consider a particular claim, I do not address whether the other plaintiffs also have standing to challenge the Second Executive Order under the INA. *See Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

grounds, 519 U.S. 1 (1996) (per curiam). As the government concedes, by barring entry of nationals from the six identified countries, Section 2(c) of the Second Executive Order operates to delay, or ultimately to prevent, the issuance of visas to nationals from those countries.

Before the President issued the Second Executive Order, John Doe #1 filed a visa application on behalf of his Iranian national wife, and took substantial steps toward the completion of the visa issuance process. However, his wife's request for a visa is still pending. It is self-evident from the language and operation of the Order that the 90-day "pause" on entry, which the government may extend, is likely to delay the issuance of a visa to John Doe #1's wife and her entry into the United States, a likelihood that is not remote or speculative.[5] Accordingly, I conclude that John Doe #1 has established the existence of an injury-in-fact that is fairly traceable to the Second Executive Order, and which is likely to be redressed by a favorable decision in this case.

II.

I turn to consider whether the plaintiffs are entitled to a preliminary injunction based on the likelihood that

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[5] For the same reasons, I reject the government's contention that the plaintiffs' claims are not ripe for review. The harm to the plaintiffs caused by separation from their family members is imminent and concrete, and is not ameliorated by the hypothetical possibility that the plaintiffs might receive a discretionary waiver under Section 3(c) of the Second Executive Order at some point in the future.

the Second Executive Order violates the INA. This Court evaluates a district court's decision to grant a preliminary injunction based on an abuse-of-discretion standard. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Under this standard, we review the district court's factual findings for clear error and review its legal conclusions de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

A preliminary injunction is an "extraordinary remedy," which may be awarded only upon a "clear showing" that a plaintiff is entitled to such relief. *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345-46 (4th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)), *vacated on other grounds*, 559 U.S. 1089 (2010). Preliminary relief affords a party before trial the type of relief ordinarily available only after trial. *Id.* at 345. A preliminary injunction must be supported by four elements: (1) a likelihood of success on the merits; (2) that the plaintiff likely will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities weighs in the plaintiff's favor; and (4) that a preliminary injunction is in the public interest. *Id.* at 346.

A.

I begin by considering whether the plaintiffs are likely to succeed on the merits of a claim that the Second Executive Order fails to comply with the requirements of the INA. In interpreting a statute, courts first must consider the plain meaning of the statutory language. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). A statute's plain meaning derives from consideration of all the words employed, rather than

from reliance on isolated statutory phrases. *Id.* (citing *United States v. Mitchell*, 518 F.3d 230, 233-34 (4th Cir. 2008)).

i.

Initially, I would reject the plaintiffs' contention that 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas, operates as a limitation on the President's authority under 8 U.S.C. § 1182(f) to "suspend the entry of all aliens or any class of aliens" if he finds that the entry of such aliens "would be detrimental to the interests of the United States." Section 1152(a)(1)(A) provides that:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Thus, the plain language of Section 1152(a)(1)(A) addresses an alien's ability to obtain an immigrant visa. Section 1182(f), on the other hand, explicitly addresses an alien's ability to *enter* the United States, and makes no reference to the issuance of visas. *See* 8 U.S.C. § 1182(f). I am unpersuaded by the plaintiffs' attempt to read into Section 1152(a)(1)(A) terms that do not appear in the statute's plain language.

Sections 1152(a)(1)(A) and 1182(f) address two distinct actions in the context of immigration, namely, the issuance of a visa and the denial of an alien's ability to enter the United States. Indeed, the fact that an alien possesses a visa does not guarantee that person's ability to enter the United States. For example, an alien

who possesses a visa may nonetheless be denied admission into the United States for a variety of reasons set forth elsewhere in the INA. *See* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [sic] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."). For these reasons, I would reject the plaintiffs' assertion that Section 1152(a)(1)(A) provides a basis for affirming the preliminary injunction issued by the district court.

ii.

Nevertheless, I would conclude that the plaintiffs' request for injunctive relief is supported by the President's failure to comply with Section 1182(f). In issuing his proclamation under Section 2(c), the President relied exclusively on two provisions of the INA. The President stated in material part:

> I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

82 Fed. Reg. at 13,213.

Section 1185(a), however, does not confer any authority on a president. Instead, that statute imposes certain requirements on persons traveling to and from the United States, and renders unlawful their failure to comply with the requirements of the statute.

In contrast, Section 1182(f) addresses a president's authority to impose restrictions on the entry of aliens into the United States. Section 1182(f) states, in relevant part: "Whenever the [p]resident finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," the president may "suspend the entry [into the United States] of all aliens or any class of aliens." Although this language provides broad discretion to a president to suspend the entry of certain aliens and classes of aliens, that discretion is not unlimited.

The plain language of Section 1182(f) permits a president to act only if he "finds" that entry of the aliens in question "*would be* detrimental to the interests of the United States" (emphasis added). In my view, an unsupported conclusion will not satisfy this "finding" requirement. Otherwise, a president could act in total disregard of other material provisions of the INA, thereby effectively nullifying that complex body of law enacted by Congress.

Here, the President's "finding" in Section 2(c) is, in essence, a non sequitur because the "finding" does not follow from the four corners of the Order's text. In particular, the text fails to articulate a basis for the President's conclusion that entry by any of the approx-

imately 180 million[6] individuals subject to the ban "would be detrimental to the interests of the United States."

I reach this conclusion by examining the Order's relevant text. In Section 1(a) of the Order, the President declares that the policy of the United States is "to protect its citizens from terrorist attacks, including those committed by foreign nationals," and "to improve the screening and vetting protocols and procedures" involved in issuing visas and in the administration of the United States Refugee Admissions Program. 82 Fed. Reg. at 13,209. The Order explains that such screening and vetting procedures are instrumental "in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States." *Id.*

The Order further states that the governments of Iran, Libya, Somalia, Sudan, Syria, and Yemen are unlikely to be willing or able "to share or validate important information about individuals seeking to travel to the United States," because these countries: (1) have porous borders facilitating "the illicit flow of

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[6] *See* Cent. Intelligence Agency, *The World Factbook, Country Comparison: Population*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (last visited May 19, 2017) (saved as ECF opinion attachment) (listing populations of the six identified countries, in the total amount of more than 180 million). Notably, the class of banned "nationals" potentially includes citizens of one of the six identified countries whether or not those citizens have ever been physically present in one of these countries. *See* Cent. Intelligence Agency, *The World Factbook, Field Listing: Citizenship*, https://www.cia.gov/library/publications/the-world-factbook/fields/2263.html (last visited May 19, 2017) (saved as ECF opinion attachment).

weapons, migrants, and foreign terrorist fighters"; (2) have been compromised by terrorist organizations; (3) contain "active conflict zones"; or (4) are state sponsors of terrorism. *Id.* at 13,210-11. In light of these conditions, the Second Executive Order proclaims that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13,211.

Significantly, however, the Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States. Nor does the Order articulate a relationship between the unstable conditions in these countries and any supposed propensity of the nationals of those countries to commit terrorist acts or otherwise to endanger the national security of the United States. For example, although the Order states that several of the six countries permit foreigners to establish terrorist safe havens within the countries' borders, the Order does not assert that any *nationals* of the six countries are likely to have joined terrorist organizations operating within those countries, or that members of terrorist organizations are likely to pose as *nationals* of these six countries in order to enter the United States to "commit, aid, or support acts of terrorism." *See id.* at 13,210-12 (noting, among other things, that the Syrian government "has allowed or encouraged extremists to pass through its territory to enter Iraq," and that "ISIS

continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States").

The text of the Second Executive Order therefore does not identify a basis for concluding that entry of any member of the particular class of aliens, namely, the more than 180 million nationals of the six identified countries, would be detrimental to the interests of the United States. In the absence of any such rationale articulating the risks posed by this class of foreign nationals, the President's proclamation under Section 2(c) does not comply with the "finding" requirement of the very statute he primarily invokes to issue the ban imposed by Section 2(c).

The government asserted at oral argument in this case that the Second Executive Order nevertheless can stand on the rationale that the President is "not sure" whether any of the 180 million nationals from the six identified countries present a risk to the United States. Oral Arg. 38:04-40:11. I disagree that this rationale is sufficient to comply with the specific terms of Section 1182(f). Although this statute does not require the President to find that the entry of any alien or class of aliens would present a danger to the United States, the statutory text plainly requires more than vague uncertainty regarding whether their entry might be detrimental to our nation's interests. Indeed, given the scope of Section 2(c), the President was required under Section 1182(f) to find that entry of any members of the identified class *would be* detrimental to the interests of the United States.

Instead of articulating a basis why entry of these foreign nationals "would be detrimental" to our national interests, the Order merely proposes a process under which the executive branch will study the question. *See* 82 Fed. Reg. at 13,212-13. This "study" proposal is an implicit acknowledgement that, presently, there is no affirmative basis for concluding that entry of nationals from these six countries "*would be* detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added).

The government likewise fails in its attempt to justify the Second Executive Order by relying on the prior exclusion of individuals from the Visa Waiver Program who had certain connections to the six countries identified in the Order. *See* 82 Fed. Reg. at 13,209. Generally, the Visa Waiver Program allows nationals of specific countries to travel to the United States without a visa for purposes of tourism or business for up to 90 days. *See generally* 8 U.S.C. § 1187. Based on modifications to the Program made by Congress in 2015 and by the Secretary of Homeland Security in 2016, people with certain connections to the six named countries no longer were permitted to participate in the Program.[7] As a result, those newly ineligible aliens became subject to the *standard* procedures

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[7] *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989-91; Department of Homeland Security, U.S. Customs and Border Protection-009 Electronic System for Travel Authorization System of Records, 81 Fed. Reg. 39,680, 39,682 (June 17, 2016).

required for the issuance of visas.[8] Thus, exclusion from the Visa Waiver Program merely reimposed for such aliens the customary requirements for obtaining a visa, and did not impose any additional conditions reflecting a concern that their entry "would be detrimental to the interests of the United States." Further, the above-described limitations of the Visa Waiver Program underscore the fact that, currently, the relevant class of aliens does not enjoy "*unrestricted* entry" into the United States as incorrectly stated in Section 2(c) of the Second Executive Order. *See* 82 Fed. Reg. at 13,213 (emphasis added).

Accordingly, I would hold that the text of Section 2(c) fails to meet the statutory precondition for the lawful exercise of a president's authority under Section 1182(f). I thus conclude that the plaintiffs likely would succeed on the merits of this particular statutory issue. *See Winter*, 555 U.S. at 20.

B.

I also would conclude with respect to Section 1182(f) that the plaintiffs would satisfy the remaining *Winter* factors, because they are "likely to suffer irreparable harm in the absence of preliminary relief," the balance of the equities would resolve in their favor, and an injunction would be in the public interest. *Id.* First, at

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[8] *See* U.S. Customs & Border Prot., *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions*, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq (last visited May 19, 2017) (saved as ECF opinion attachment).

a minimum, plaintiff John Doe #1 has shown that absent an injunction, he likely will be subject to imminent and irreparable harm based on the prolonged separation from his wife that will result from enforcement of the Second Executive Order. *See Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). And, based on my conclusion that Section 2(c) is invalid on its face, I would hold that an injunction should be issued on a nationwide basis.

Next, the balance of harms weighs in favor of granting a preliminary injunction. *See Winter*, 555 U.S. at 24. The government's interest in enforcing laws related to national security as a general matter would be a strong factor in its favor. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). However, because the Second Executive Order does not comply with the threshold requirement for a president's lawful exercise of authority under Section 1182(f), the government's interest cannot outweigh the real harms to the affected parties. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (reviewing the First Executive Order, dismissing the government's claim of irreparable injury, and noting that "the Government has done little more than reiterate" its general interest in combating terrorism).

Finally, the public interest also strongly favors a preliminary injunction, because the public has an interest "in free flow of travel" and "in avoiding separation of families." *Id.* at 1169. And, most importantly, the public interest is served by ensuring that any actions taken by the President under Section 1182(f) are lawful and do not violate the only restraint on his authority contained in that statute.

III.

Accordingly, in addition to affirming the district court's judgment with respect to the plaintiffs' Establishment Clause claim and the issuance of a nationwide injunction, I would affirm the court's judgment and award of injunctive relief on the separate basis that the Second Executive Order is invalid on its face because it fails to comply with the "finding" requirement of Section 1182(f).

WYNN, Circuit Judge, concurring:

Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination. We have matured from the lessons learned by past experiences documented, for example, in *Dred Scott* and *Korematsu*. But we again encounter the affront of invidious discrimination—this time layered under the guise of a President's claim of unfettered congressionally delegated authority to control immigration and his proclamation that national security requires his exercise of that authority to deny entry to a class of aliens defined solely by their nation of origin. Laid bare, this Executive Order is no more than what the President promised before and after his election: naked invidious discrimination against Muslims. Such discrimination contravenes the authority Congress delegated to the President in the Immigration and Nationality Act (the "Immigration Act"), 8 U.S.C. § 1101 *et seq.*, and it is unconstitutional under the Establishment Clause.

To that end, I concur fully in the majority opinion, including its analysis and conclusion that Section 2(c) of the Executive Order, which suspends entry of nationals from six predominantly Muslim countries, likely violates the Establishment Clause. In particular, I agree that even when the President invokes national security as a justification for a policy that encroaches on fundamental rights, our courts must not turn a blind eye to statements by the President and his advisors bearing on the policy's purpose and constitutionality. Those statements characterized Section 2(c) as the realization of the President's repeated promise, made before and

after he took office, to ban Muslims.[1] And I agree that "the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country."[2] *Ante* at 75.

I write separately because I believe Plaintiffs' claim that Section 2(c) exceeds the President's authority under the Immigration Act also is likely to succeed on the merits. That statute authorizes the President to suspend the "entry of any aliens or of any class

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[1] The answer to the rhetorical question of whether the President will be able to "free himself from the stigma" of his own self-inflicted statements, *post* at 189, lies in determining whether the Executive Order complies with the rule of law. That requires us to consider, in each instance, how the character, temporality, and nature of the President's repeated, public embrace of an invidiously discriminatory policy offensive to the Constitution bear on a challenged policy.

[2] It strains credulity to state that "the security of our nation is indisputably *lessened* as a result of the injunction." *Post* at 188 (emphasis added). Rather, the district court's order only enjoined implementation of Section 2(c) of the Executive Order—a provision that the President maintained would *increase* national security. Indeed, two reports released by the Department of Homeland Security in February 2017 and March 2017 found that citizenship is an "unlikely indicator" of whether an individual poses a terrorist threat to the United States and that most of the individuals who have become U.S.-based violent extremists have been radicalized after living in the United States for a period of years. J.A. 233. The Government has not provided any information suggesting, much less establishing, that the security risks facing our country are any different today than they were when the President first sought to impose this temporary ban only seven days into his presidency.

of aliens" that he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Because the Executive Order here relies on national origin as a proxy for discrimination based on religious animus, the Government's argument that Section 2(c)'s suspension on entry "falls squarely within the President's broad authority" under Section 1182(f) essentially contends that Congress delegated to the President virtually unfettered discretion to deny entry to any class of aliens, including to deny entry solely on the basis of nationality and religion. Appellants' Br. at 28. Not so.

To the contrary, the Immigration Act provides no indication that Congress intended the "broad generalized" delegation of authority in Section 1182(f) to allow the President "to trench . . . heavily on [fundamental] rights."[3] And even if the plain language of Section 1182(f) suggested Congress had given the President such unfettered discretion to invidiously discriminate based on nationality and religion—which it does not—a statute delegating to the President the authority to engage in such invidious discrimination would raise grave constitutional concerns. Indeed, imposing burdens on individuals solely on the basis of their race, national origin, or religion—"a classification of persons undertaken for its own sake . . . inexplicable by anything but animus towards the class it affects"[4]—is "odious to a free people whose institutions are founded

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[3] *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

[4] *Romer v. Evans*, 517 U.S. 620, 636, 632 (1996).

upon the doctrine of equality."[5] That is why—even when faced with a congressional delegation of seemingly unbridled power to the President or his appointees —the Supreme Court repeatedly "ha[s] read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation" when the delegation provides no explicit statement that Congress intended for the executive to use the delegated authority in a manner in conflict with constitutional protections.[6]

Accordingly, I conclude that Section 2(c)'s suspension on entry likely exceeds the President's authority under the Immigration Act to deny entry to classes of aliens.

I.

The majority opinion does not reach the merits of Plaintiffs' claim that Section 2(c)'s suspension on entry violates the Immigration Act, and Section 1182(f), in particular. *Ante* at 28-31. The district court, however, concluded that the Executive Order likely violates the Immigration Act insofar as Section 2(c) effectively prohibits the issuance of immigrant visas to aliens from the six countries based on their nationalities. *Int'l Refugee Assistance Project v. Trump*, – F. Supp. 3d –, 2017 WL 1018235, at *10 (D. Md. Mar. 16, 2017). And the Government has argued, both on appeal and before the district court, that the suspension on entry falls within the President's delegated power under

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[5] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[6] *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Section 1182(f). Appellants' Br. at 28-30. Accordingly, the question of whether Section 2(c) complies with Section 1182(f) is squarely before this Court.[7]

Section 1182(f) provides, in relevant part, that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants,

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[7] The Government also asserts that Section 2(c)'s suspension on entry is authorized by Section 1185(a) of the Immigration Act, which "authorizes the President to prescribe 'reasonable rules, regulations, and orders,' as well as 'limitations and exceptions,' governing the entry of aliens." Appellants' Brief at 29 (quoting 8 U.S.C. § 1185(a)). The Government does not argue that Sections 1182(f) and 1185(a) confer meaningfully different powers on the President. Because Section 1182(f) is specifically tailored to the suspension on entry, and because there is no reason to believe that the analysis would be different under Section 1185(a), my analysis will proceed under Section 1182(f).

Additionally, because the Executive Order cites the Immigration Act as the sole statutory basis for the President's authority to proclaim Section 2(c)'s suspension on entry, I need not, and thus do not, take any position on the scope of the President's delegated power to deny entry to classes of aliens under other statutes. Likewise, because the claim at issue relates only to Section 2(c)'s compliance with the Immigration Act, I do not address whether, and in what circumstances, the President may deny entry to classes of aliens under his inherent powers as commander-in-chief, even absent express congressional authorization. *See The Prize Cases*, 67 U.S. 635 (1862).

Finally, I agree with Judge Keenan's analysis and conclusion that, at a minimum, John Doe #1 has standing to pursue Plaintiffs' Immigration Act claim. *Ante* at 82-83.

or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Like the district court, the majority opinion finds, and I agree, that Plaintiffs are likely to establish—based on statements by the President and his advisors—that in promulgating Section 2(c), the President relied on one suspect classification (national origin) as a proxy to purposely discriminate against members of another suspect class (adherents to a particular religion) solely on the basis of their membership in that class. *Ante* at 58. Thus, in considering Plaintiffs' statutory claim, we confront the following question: Did Congress, in enacting Section 1182(f), authorize the President to deny entry to a class of aliens on the basis of invidious discrimination?

A.

Two related canons of statutory construction bear directly on this question. First, under the "constitutional avoidance canon," "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible' [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted) (quoting *Crowell*, 285 U.S. at 62). This canon "rest[s] on the reasonable presumption that Congress did not intend

[an interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Put differently, "[t]he courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Supreme Court has applied the constitutional avoidance canon on several occasions to narrow facially broad statutes relating to immigration and national security. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court assessed whether Section 1231(a)(6) of the Immigration Act—which provides that certain categories of aliens who have been ordered removed "may be detained beyond the removal period" —authorized the detention of such categories of aliens indefinitely. 533 U.S. at 689. Notwithstanding that Section 1231(a)(6) placed no express limitation on the duration of such detentions, the Supreme Court "read an implicit limitation into the statute . . . limit[ing] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* Explaining that "permitting indefinite detention of an alien would raise a serious constitutional problem" and noting the absence of "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed," the Supreme Court concluded that the constitutional avoidance canon required adoption of the "implicit limitation." *Id.* at 690, 697.

The Supreme Court also relied on the constitutional avoidance canon in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). In that case, the Supreme Court rejected the Government's arguments that two statutes amending the Immigration Act (1) deprived the judiciary of jurisdiction to review habeas petitions filed by certain aliens subject to removal orders and (2) retroactively deprived certain aliens who had pled guilty to criminal offenses —which convictions rendered such aliens removable— the opportunity to pursue a discretionary waiver of removal, notwithstanding that such aliens had been entitled to pursue such a waiver at the time of their plea. *Id.* at 292-93, 297. In reaching these conclusions, the Supreme Court acknowledged that Congress, at least in certain circumstances, has the constitutional authority to repeal habeas jurisdiction and to make legislation retroactive. *Id.* at 298-99, 315-16. Nonetheless, because (1) the Government's proposed constructions would require the Supreme Court to hold that Congress intended to exercise "the outer limits of [its] power" under the Constitution and (2) the legislation included no "clear, unambiguous, and express statement of congressional intent" indicating that Congress intended to exercise the "outer limits" of its power, the Supreme Court rejected the Government's positions. *Id.* at 299, 313-26.

The second applicable canon of construction—which is a corollary to the constitutional avoidance canon— requires an even clearer indication of congressional intent regarding the infringement on constitutional rights due to the absence of direct action by Congress. That canon forbids courts from construing a "broad

generalized" delegation of authority by Congress to the executive as allowing the executive to exercise that delegated authority in a matter that "trench[es]" upon fundamental rights, *Kent v. Dulles*, 357 U.S. 116, 129 (1958), absent an "explicit" statutory statement providing the executive with such authority, *Greene v. McElroy*, 360 U.S. 474, 507 (1959). Under this canon, which I will refer to as the "delegation of authority canon," courts must "construe narrowly all delegated powers that curtail or dilute" fundamental rights. *Kent*, 357 U.S. at 129; *see also United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [in a delegation] narrows, however, when the regulation . . . potentially affects fundamental rights. . . . This is because the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake."). The Supreme Court requires that delegations that potentially authorize the executive to encroach on fundamental rights "be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting *and* implementing our laws." *Greene*, 360 U.S. at 507 (emphasis added) (citation omitted).

As with the constitutional avoidance canon, the Supreme Court has applied the delegation of authority canon to statutes involving immigration and national security. For example, in *United States v. Witkovich*,

353 U.S. 194 (1957), the Supreme Court interpreted Section 242(d)(3) of the Immigration and Nationality Act of 1952, which provided that the Attorney General could require any alien subject to a final order of deportation that had been outstanding for more than six months "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." 353 U.S. at 195 (quoting 8 U.S.C. § 1252(d)(3) (1952)). The Government asserted that the plain language of the provision afforded the Attorney General near unfettered discretion to demand information from such aliens. *Id.* at 198. Although the Supreme Court acknowledged that "[t]he language of [Section] 242(d)(3), if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of [such] aliens," the Supreme Court limited the Attorney General's authority under Section 242(d)(3) to "questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue." *Id.* at 199, 202. In rendering this narrowing construction, the Supreme Court emphasized, first, that the broad reading proposed by the Government would call into question the statute's constitutional validity and, second, that the context and legislative history did not provide unambiguous evidence that Congress intended to give the Attorney General the unbridled authority the Government claimed. *Id.* at 199-200.

The Supreme Court also applied the delegation of authority canon in *Kent v. Dulles*, 357 U.S. 116 (1958). There, the Supreme Court was asked to construe a statute providing that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States." 357 U.S. at 123 (internal quotation marks omitted) (quoting 22 U.S.C. § 211a (1952)). Pursuant to that authority, the executive branch promulgated a regulation authorizing the Secretary of State to demand an affidavit from any passport applicant averring whether the applicant had ever been a Communist and barring issuance of passports to Communists. *Id.* at 118 & n.2. Under that regulation, the Department of State denied a passport to an applicant on grounds he refused to submit such an affidavit. *Id.* at 118-19. Thereafter, the applicant sought a declaratory judgment that the regulation was unconstitutional. *Id.* at 119. Despite the breadth of the plain language of the delegating statute, the Supreme Court "hesitate[d] to impute to Congress . . . a purpose to give [the Secretary of State] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Id.* at 128. Emphasizing (1) that the authority to deny a passport necessarily involved the power to infringe on the fundamental right to travel and (2) that the statutory delegation provision's "broad generalized" terms were devoid of any "explicit" indication Congress had intended to "give[] the Secretary authority to withhold passports to citizens because of their beliefs or associations," the Supreme Court refused "to find in this

broad generalized power an authority to trench so heavily on the rights of the citizen." *Id.* at 129-30.

Taken together, the two canons reflect the basic principle that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 548 (1950) (Frankfurter, J., dissenting) (explaining that legislation potentially encroaching on fundamental rights "should not be read in such a decimating spirit unless the letter of Congress is inexorable"). Although closely related, the two canons are analytically distinct. In particular, the constitutional avoidance canon involves *direct actions* by Congress that potentially encroach upon fundamental rights. By contrast, the delegation of authority canon governs *delegations* by Congress that potentially allow a delegatee to exercise congressional power to encroach on fundamental rights. Because Congress does not itself decide when or how its delegated authority will be exercised, any encroachment on individual rights by Congress's delegatee must be supported by an "explicit" statement that Congress intended to permit such encroachment, *Greene*, 360 U.S. at 507—a more stringent requirement than the "clear indication" necessary when Congress acts directly, *Zadvydas*, 533 U.S. 696-97.

B.

The constitutional avoidance canon and the delegation of authority canon bear directly on the scope of authority conferred on the President by Congress under Section 1182(f) because, if construed broadly, Section 1182(f)

could authorize the President to infringe on fundamental constitutional rights. In particular, the Supreme Court has "consistently repudiated '(d)istinctions between citizens solely because of their ancestry' [or race] as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "[T]he imposition of special disabilities" upon a group of individuals based on "immutable characteristic[s] determined solely by the accident of birth," like race and national origin, runs contrary to fundamental constitutional values enshrined in the Fifth and Fourteenth Amendments because it "violate[s] 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). Accordingly, the Constitution forbids "[p]referring members of any one group for no reason other than race or ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring in judgment). Or, more simply, the Constitution prohibits "discrimination for its own sake." *Id.*

Although religion, unlike race and national origin, is not an immutable characteristic, the Constitution treats classifications drawn on religious grounds as equally offensive. The First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S.

97, 104 (1968)). To that end, the Constitution forbids both discriminating against "those who embrace[] one religious faith rather than another" and "preferring some religions over others—an invidious discrimination that would run afoul of the [Constitution]." *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

If, as the Government's argument implies, Congress delegated to the President the authority to deny entry to an alien or group of aliens based on invidious discrimination against a race, nationality, or religion, then Section 1182(f) would encroach on the core constitutional values set forth in the First, Fifth, and Fourteenth Amendments: The President could deny entry to aliens of a particular race solely based on the color of their skin. The President could deny entry to citizens of a particular nation solely on the basis of their place of birth. The President could deny entry to adherents of a particular religion solely because of their subscription to that faith. Or, as this Court concludes the President likely did here, the President could rely on one form of invidious discrimination—discrimination based on national origin—to serve as pretext for implementing another form of invidious discrimination—discrimination based on religion.

The President justified his use of this layered invidious discrimination on grounds that citizens of the six predominantly Muslim countries subject to the suspension on entry pose a special risk to United States security. Revised Order § 1(e). In particular, the Executive Order generally points to "the significant presence in each of these countries of terrorist organi-

zations, their members, and others exposed to those organizations." *Id.* § 1(d). The order also cites, as the sole example of an act of terrorism by a native of one of the six countries, a native of Somalia who was brought to the United States as a refugee at the age of two and was convicted, as an adult, of "attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." *Id.* § 1(h).

Accordingly, the President relies on the acts of *specific* individuals and groups of individuals (*i.e.*, "terrorist organizations" and "their members") within the six countries to establish that *all* citizens of those countries pose a danger to the United States. Dissenting from the Supreme Court's sanctioning of the forced internment of Japanese Americans during World War II, Justice Murphy explained the danger such rationales pose to the core constitutional value of equality:

> [T]o infer that examples of individual [misconduct] prove group [misconduct] and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference . . . has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

To be sure, the Supreme Court has recognized that, particularly in times of war,[8] Congress has broad authority to control immigration, including the power to authorize the President to establish policies restricting the entry of aliens. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that "the power to admit or exclude aliens is a sovereign prerogative" entrusted almost exclusively to Congress). And "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unac-

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[8] Congress's constitutional power to control immigration—and authority to delegate that control—fundamentally differs in a time of war. *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring) ("[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless."). The Supreme Court's broadest statements regarding the scope of the President's delegated powers over immigration—which are relied upon by the Government—are in cases in which Congress expressly declared war and authorized the President to deny entry to aliens as part of his prosecution of the conflict. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 & n.7 (1953) ("Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife [including] *the present emergency* [the Korean War]." (emphasis added)); *Knauff*, 338 U.S. at 543 ("[B]ecause the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country *during a time of national emergency* [World War II]." (emphasis added)).

ceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

But the Supreme Court also has long, and repeatedly, held that Congress's power to create immigration laws remains "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (holding that Congress's constitutionally devised powers to control immigration, among other powers, are "restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). That is particularly true when the discriminatory burdens of an immigration policy fall not just on aliens who have no claim to constitutional rights, but also on citizens and other individuals entitled to constitutional protections. *Cf. Zadvydas*, 533 U.S. at 693-94 (surveying the Supreme Court's immigration jurisprudence and finding that whether a plaintiff alien could lay claim to constitutional protections "made all the difference").

Here, aliens who are denied entry by virtue of the President's exercise of his authority under Section 1182(f) can claim few, if any, rights under the Constitution. But when the President exercises that authority based solely on animus against a particular race,

nationality, or religion, there is a grave risk—indeed, likelihood—that the constitutional harm will redound to *citizens*. For example, we hold today that the denial of entry to a class of aliens solely based on their adherence to a particular religion likely violates the Establishment Clause by sending "a state-sanctioned message that foreign-born Muslims . . . are 'outsiders, not full members of the political community.'" *Ante* at 38 (quoting *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012)). Likewise, were the President to deny entry to a class of aliens solely based on their race, *citizens* of that race would be subjected to a constitutionally cognizable "feeling of inferiority as to their status in the community." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954). And denying entry to classes of aliens based on invidious discrimination has the potential to burden the fundamental right of *citizens* to marry the partner of their choice based on nothing more than the partner's race, nationality, or religion.[9] *Loving*, 388 U.S. at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."). Put simply, when the Government engages in invidious discrimination—be it against aliens

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[9] *See Kerry v. Din*, 135 S. Ct. 2128, 2142 (2015) (Breyer, J., dissenting) (stating that a United States citizen and resident has a procedural due process interest in knowing the Government's grounds for denying a visa application by her husband, an Afghan citizen with no claim to rights under the Constitution); *id.* at 2139 (Kennedy, J., concurring in judgment) (recognizing that a United States citizen may have "a protected liberty interest in the visa application of her alien spouse").

or citizens—individuals whose rights the Constitution protects face substantial harm.

Because construing Section 1182(f) as authorizing the President to engage in invidious discrimination is plainly inconsistent with basic constitutional values and because the violation of those values implicates the rights of citizens and lawful permanent residents, not just aliens, the Government's proposed construction "raise[s] serious constitutional problems." *St. Cyr*, 533 U.S. at 299-300.

C.

Having concluded that the Government's broad reading of Section 1182(f) raises serious constitutional concerns, we must reject that construction absent a "clear indication of congressional intent" to allow the President to deny the entry of classes of aliens on invidiously discriminatory bases. *Zadvydas*, 533 U.S. at 696-97. And because Section1182(f) involves a delegation of congressional authority, not a direct action by Congress, the indication of congressional intent to authorize the President, as delegatee, to encroach on fundamental rights must be "explicit." *Greene*, 360 U.S. at 507.

To ascertain congressional intent, we look to the "plain meaning" of Section 1182(f). *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt.)*, 706 F.3d 245, 251 (4th Cir. 2013). "To determine a statute's plain meaning, we not only look to the language itself but also the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (internal quotation marks omitted); *see also U.S. Nat'l*

Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (holding that in ascertaining congressional intent, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (internal quotation marks omitted)). Here, neither the language of Section 1182(f), nor the context in which the language is used, nor the "object and policy" underlying the Immigration Act "explicitly" state, much less "clear[ly] indicat[e]," that Congress intended to authorize the President to deny entry to aliens based on invidious discrimination.

1.

Beginning with the plain language, Section 1182(f) permits the President to suspend the entry of "any aliens or of any class of aliens" *only* when he "finds that the entry of [such aliens] would be detrimental to the interests of the United States." Accordingly, the plain language of Section 1182(f) does not explicitly authorize the President to deny entry to a class of aliens solely defined by religion or by race, national origin, or other immutable characteristic.

Nonetheless, in arguing that Section 1182(f) authorizes the Executive Order's suspension on entry, the Government focuses on that statute's use of the (concededly broad) term "any class of aliens." Appellants' Br. at 28-29. But the Government's argument omits the crucial limitation Congress imposed by requiring that the President may bar entry *only* upon a finding that entry of a class of aliens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That restriction requires a substantive connection between

an alien's membership in a particular class and the likelihood that her entry would be detrimental to the interests of the United States.

Detrimental is defined as "harmful" or "damaging." Webster's Third New International Dictionary (2002). Accordingly, Section 1182(f) authorizes the President to deny entry to an alien if the President has reason to believe that, by virtue of the alien being a member of a particular class, her entry is more likely to damage or harm the interests of the United States. But the Constitution forbids imposing legal burdens on a class of individuals solely based on race or national origin precisely because those immutable characteristics bear no "relationship to individual responsibility." *Weber*, 406 U.S. at 175. Because an alien's race or national origin bears no "relationship to individual responsibility," those characteristics, by themselves, cannot render it more likely that the alien's entry will damage or harm the interests of the United States. *Cf. Romer*, 517 U.S. at 632, 636 (holding that "a classification of persons undertaken for its own sake" is "inexplicable by anything but animus towards the class it affects[, has no] relationship to legitimate state interests," and therefore violates the Fourteenth Amendment). Likewise, the Constitution's prohibition on discriminating against "those who embrace[] one religious faith rather than another," *Seeger*, 380 U.S. at 188 (Douglas, J., concurring), means that an alien's adherence to a particular religion alone also provides no constitutionally cognizable basis for concluding that her entry is disproportionately likely to harm or damage the interests of the United States.

Because race, national origin, and religion bear no factual or constitutionally cognizable relationship to individual responsibility, courts have long interpreted delegation provisions in the Immigration Act as barring executive officials from engaging in invidious discrimination. For example, in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (Hand, J.), the Second Circuit recognized "implied limitations" on Congress's facially broad delegation of authority to the Attorney General to suspend the deportation of any alien unlawfully present in the country. 180 F.2d at 490. Writing for the court, Judge Hand suggested that denying suspension of deportation based on "irrelevant" reasons having no bearing on whether the "alien's continued residence [was] prejudicial to the public weal"—such as "becom[ing] too addicted to attending baseball games, or ha[ving] bad table manners"—would exceed the Attorney General's congressionally delegated authority. *Id.* Factors like these, Judge Hand explained, are "considerations that Congress *could not have intended to make relevant*" to a determination of whether an alien could permissibly remain in the United States.[10] *Id.* at 491 (emphasis added). Under the dictates of equality established by the Constitution, an alien's race, nationality, or religion is as irrelevant to the potential for his entry to harm

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[10] Notably, *Kaloudis* found a basis for this clear outer limit on congressional delegations of discretionary authority to the executive branch in the Immigration Act well before Congress made explicit, in comprehensively amending the Immigration Act, that discrimination on the basis of race, sex, ethnicity, and nationality has no place in controlling immigration. *See infra* Part I.C.3.

the interests of the United States as is the alien's addiction to baseball or his poor table manners.

Judge Friendly made this point clear in *Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2d Cir. 1966) (Friendly, J.). There, the Second Circuit again confronted a question regarding the scope of the Attorney General's authority —delegated by Congress—to suspend an alien's deportation. 360 F.2d at 716-17. Judge Friendly concluded that "the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or *rested on an impermissible basis such as an invidious discrimination against a particular race or group.*" *Id.* at 719 (emphasis added). Like addiction to baseball and poor table manners, invidious discrimination is a "consideration[] that Congress could not have intended to make relevant" to decisions regarding whether to allow an alien residence in the United States, Judge Friendly held. *Id.* (internal quotation marks omitted) (quoting *Kaloudis*, 180 F.2d at 491).

Just as Congress "could not have intended to make" considerations like "invidious discrimination against a particular race or group" relevant to the Attorney General's discretionary decision to suspend an alien's deportation from the United States, *id.*, Congress "could not have intended to make" invidious discrimination relevant to the President's discretionary determination regarding whether the entry of a particular alien or class of aliens is "detrimental to the interests of the United States," 8 U.S.C. § 1182(f). That is because invidious discrimination has no connection to whether an alien's residence in the United States would

be harmful or damaging to the nation or its interests. Accordingly, not only does the plain language of Section 1182(f) fail to "explicitly" authorize the President to use invidious discrimination in determining whether to deny entry to a class of aliens, *see Greene*, 360 U.S. at 507, it does not even provide a "clear indication" that Congress intended to delegate to the President the power to invidiously discriminate, *see Zadvydas*, 533 U.S. at 696-97.

2.

Nor does the broader context of the Immigration Act, and Section 1182(f)'s place within it, suggest that Congress intended Section 1182(f) to allow the President to suspend the entry of a class of aliens based on invidious discrimination. In Section 1182(a), Congress enumerates numerous specific classes of aliens who are ineligible for visas or admission. These categories encompass, for example, classes of individuals who pose a variety of health, safety, and security risks, or are likely to become public charges. *See generally* 8 U.S.C. § 1182(a). Many of the categories are quite specific, providing particularized reasons why individual aliens may be deemed inadmissible. For example, aliens who have been convicted of certain crimes, served as foreign government officials and committed "particularly severe violations of religious freedom," or participated in the commission of torture are inadmissible. 8 U.S.C. § 1182(a)(2)(A), (G); *id.* § 1182(a)(3)(E)(iii). Likewise, Section 1182(a) deems inadmissible aliens who have been members of a totalitarian or Communist party, abused their status as student visa holders, or

"engaged in the recruitment or use of child soldiers." *Id.* § 1182(a)(3)(D); *id.* § 1182(a)(6)(G); *id.* § 1182(a)(3)(G).

Importantly, most of the categories of inadmissible classes of aliens Congress sets forth in Section 1182(a) relate to past *conduct* by an alien that renders the alien particularly dangerous to the interests of the United States. *E.g.*, § 1182(a)(2); § 1182(a)(3); § 1182(a)(6)(E); § 1182(a)(8)(B); § 1182(a)(9)(A). And, in accordance with Congress's decision to define categories of inadmissible aliens largely based on individual conduct and responsibility rather than considerations over which aliens have no control, none of the Section 1182(a) categories render a class of aliens inadmissible solely on the basis of religion or of race, national origin, or other immutable characteristic.

Notwithstanding Congress's enumeration of the many general and specific categories and classes of aliens that the executive branch may or must deem inadmissible—and its failure to include any category defined by race, national origin, or religion alone—the Government argues that, in enacting Section 1182(f), Congress delegated to the President the authority to deny entry to any class of aliens for any reason whatsoever, necessarily including for invidiously discriminatory reasons. Appellants' Br. at 28-29. But in construing a statutory provision, we must, if at all possible, avoid a construction "that would render another provision [in the same statute] superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010). And reading Section 1182(f) as conferring on the President the unbridled authority to deny entry to any class of aliens would impermissibly render superfluous the numerous

specific classes of inadmissible aliens that Congress has enumerated in Section 1182(a).

The District of Columbia Circuit reached an identical conclusion in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ginsburg, J.). There, the court considered 8 U.S.C. § 1182(a)(27) ("Subsection (27)"), which required the Attorney General to exclude an alien if the Attorney General had reason to believe that the alien sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." 785 F.2d at 1047 (internal quotation marks omitted) (quoting 8 U.S.C. § 1182(a)(27) (1982)). The question at issue was whether Subsection (27) allowed the Attorney General to "exclude aliens whose entry might threaten [United States'] foreign policy objectives simply because of their membership in Communist organizations," *id.* at 1057, when an adjacent provision in the statute, 8 U.S.C. § 1182(a)(28) ("Subsection (28)"), specifically dealt with exclusion of aliens who were or previously had been members of any Communist party, *Abourezk*, 785 F.2d at 1048. Then-Judge (now Justice) Ginsburg concluded that reading the Attorney General's vague and generalized delegated authority under Subsection (27) to allow exclusion on such a basis would impermissibly render Subsection (28) "superfluous." *Id.* at 1057.

"To preserve the significance of both sections, and the congressional intent that guided their adoption," the court held that the Attorney General could not rely on Subsection (27) to exclude aliens who were or had been members of a Communist party unless "the rea-

son for the threat to the 'public interest[,] . . . welfare, safety, or security'" that the Attorney General put forward as a basis for barring entry under Subsection (27) was "*independent of* the fact of membership in or affiliation with the proscribed organization." *Id.* at 1058 (alterations in original) (quoting 8 U.S.C. § 1182(a)(27)). Put differently, the court prohibited the executive branch from using the general exclusionary authority conferred by Congress in Subsection (27) to circumvent the more specific provision in Subsection (28) dealing with exclusion of aliens affiliated with the Communist party. *Id.* at 1057-58.

For the same reason, the President's reliance on Section 1182(f) as a basis for Section 2(c)'s suspension on entry also is inconsistent with Section 1182(a)(3)(B), which includes "specific criteria for determining terrorism-related inadmissibility." *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). Recall that the Executive Order justified the President's suspension on entry, in part, on grounds that certain nationals of the six countries were members of terrorist organizations or previously had engaged in acts of terrorism and, therefore, that admitting aliens from those countries would be detrimental to the interests of the United States. *See supra* Part I.B.

Section 1182(a)(3)(B) renders inadmissible aliens who have been, are, or may in the future be connected to or engaged in terrorist activity, including aliens who have "engaged in a terrorist activity"; those whom government officials know or have reasonable cause to believe are "likely to engage after entry in any terrorist activity"; those who have "incited terrorist activity";

and those who "endorse[] or espouse[] terrorist activity or persuade[] others to" do so or who "support a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i). That subsection also provides detailed definitions of "terrorist activity," "terrorist organization," the act of "engag[ing] in terrorist activity," and "representative" of a terrorist organization. *Id.* § 1182(a)(3)(B)(iii)-(vi).

Congress established these "specific criteria for determining terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140, against the backdrop of the executive branch's exclusion of aliens based on "mere membership in an organization, some members of which have engaged in terrorist activity" even when there was no indication that *the alien seeking admission* was himself engaged in such activity. H.R. Rep. No. 100-882, at 19 (1988). By enacting specific provisions regarding the inadmissibility of aliens who are or have been engaged in terrorist activity, Congress sought to make clear that "the definitions of 'terrorist activity' and 'engages in terrorist activity' must be applied on a case by case basis" and that "simple membership in any organization . . . is not *per se* an absolute bar to admission to the United States"—whether under the President's general authority to bar entry or otherwise. *Id.* at 30.

If Congress has deemed it unlawful for the President to absolutely bar the entry of aliens who *are members of an organization* that includes some members who engage in terrorism, it defies logic that Congress delegated to the President in Section 1182(f) the far broader power to absolutely bar the entry of aliens who *happen to have been born in a particular country*, within the borders of which some individuals have

engaged in terrorism. Indeed, this is precisely why courts apply the canon of statutory construction "that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal quotation marks omitted). When, as here, a statute includes "a general authorization [Section 1182(f)] and a more limited, specific authorization [Section 1182(a)(3)(B)] . . . side-by-side" that canon requires that "[t]he terms of the specific authorization must be complied with" in order to avoid "the superfluity of a specific provision that is swallowed by the general one." *Id.* Accordingly, Section 1182(a)(3)(B), not Section 1182(f), is the congressionally authorized mechanism for the President to deny entry to aliens whom he concludes are detrimental to the United States because they pose a threat of engaging in terrorist activities. *See Abourezk*, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under Section 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*." (emphasis added)).

Interpreting Section 1182(f) to allow the President to suspend the entry of aliens based solely on their race, nationality, or other immutable characteristics also would conflict with 8 U.S.C. § 1152(a), which provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Congress passed Section 1152(a) in 1965, more than a decade after it enacted Section 1182(f), as part of a

comprehensive revision to the Immigration Act intended to eliminate nationality-based discrimination in the immigration system. *See infra* Part I.C.3.

Section 1152(a) deals with issuance of *immigrant visas*, rather than entry, which is governed by Section 1182. Nonetheless, reading Section 1182(f) as authorizing the President to deny entry based on invidious discrimination would place Section 1182(f) in conflict with Section 1152(a), which prohibits invidious discrimination in the issuance of visas. In particular, the Immigration Act authorizes the executive branch to refuse to issue a visa to any alien who "is ineligible to receive a visa or such other documentation under section 1182." 8 U.S.C. § 1201(g). As the Government concedes, the President's exercise of his authority under Section 1182(f) to deny entry to aliens from the six predominantly Muslim countries, were it lawful, also would bar, by virtue of Section 1201(g), such aliens from obtaining visas, including *immigrant* visas. This would be the very result Congress sought to avoid in ending nationality-based discrimination in the issuance of immigrant visas through its passage of Section 1152(a).

Accordingly, Section 1182(f)'s function within the Immigration Act does not clearly indicate that Congress intended to delegate to the President the authority to suspend the entry of aliens based on invidious discrimination. On the contrary, construing Section 1182(f) as broadly authorizing the President to engage in invidious discrimination in denying entry would render superfluous the numerous categories of inadmissible aliens Congress took pains to identify in Sec-

tion 1182(a), including the provisions directly addressing aliens who pose a risk of engaging in terrorist activities, and conflict with Section 1152(a)'s prohibition on discrimination based on race, nationality, and other immutable characteristics.

3.

Reading Section 1182(f) as allowing the President to deny entry to classes of aliens based on invidious discrimination also would contradict the "object and policy" underlying the Immigration Act. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455. Although the specific language of Section 1182(f) dates to 1952, Congress "comprehensive[ly] revis[ed]" the Immigration Act in 1965 (the "1965 Revisions"). *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 78 (1964) (statement of Sen. Fong). Those revisions were drafted concurrently with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and enacted at the height of the civil rights movement with the express purpose of "eliminat[ing] the national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965); *see also S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 3*, 88th Cong. 107 (1964) (statement of Sen. Hart) ("A law that says that one man is somewhat less than another simply because of accident of his place of birth is not tolerable in the year 1964. A formula based on equality and fair play must be enacted. Selection

should be based primarily on questions of our own national interest.").

Prior to the 1965 Revisions, the Immigration Act employed nationality-based quotas, limiting the number of immigrants admissible to the nation each year based on nation of birth. President Kennedy called on Congress to repeal the nationality-based quota system, condemning it as a system "without basis in either logic or reason" that "neither satisfie[d] a national need nor accomplishe[d] an international purpose" but instead "discriminate[d] among applicants for admission into the United States on the basis of accident of birth." Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, 1963 PUB. PAPERS 594, 595 (July 23, 1963). After President Kennedy's assassination, President Johnson renewed Kennedy's request for "the elimination of the national origins quota system," which he described as "incompatible with our basic American tradition" and "our fundamental belief that a man is to be judged—and judged exclusively—on his worth as a human being." Special Message to the Congress on Immigration, 1965 PUB. PAPERS 37, 37, 39 (Jan. 13, 1965).

The 1965 Revisions answered President Kennedy's and President Johnson's calls. Congress explained that the 1965 Revisions abolished nationality-based discrimination in the immigration system in order to "firmly express in our immigration policy the dedication which our nation has to the principles of equality, of human dignity, and of the individual worth of each man and woman." *S. 1932 & Other Legislation Relating to the*

Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 1, 88th Cong. 4 (1964) (statement of Sen. Kennedy). Time and again Congress connected the need to eliminate the nationality-based quota system to American "tenets of equality irrespective of race, creed, or color" and emphasized that abolishing nationality-based quotas "demonstrat[ed] to the whole world that we practice what we preach, and that all men are equal under law." *S. 1932 & Other Legislation Relating to the Immigration Quota System Before the S. Subcomm. on Immigration & Naturalization Vol. 2*, 88th Cong. 100-01 (1964) (statement of Sen. Fong); *see also id. Vol. 1*, at 9 (statement of Sen. Hart) (explaining that the 1965 Revisions abolished the "irrational . . . national origins concept, which said in clear and echoing words that the people of some nations [we]re more welcome to America than others" based on "[a]rbitrary ethnic and racial barriers").

Upon signing the bill into law at Liberty Island, New York, President Johnson lauded the end of the nationality-based discrimination that previously defined the American system of immigration, describing the 1965 Revisions as abolishing "the harsh injustice of the national origins quota system," which "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." 1965 PUB. PAPERS 1037, 1038-39 (Oct. 3, 1965). As a result of the 1965 Revisions, immigrants would be permitted to come to America "because of what they are, and *not because of the land from which they sprung.*" *Id.* at 1039 (emphasis added).

To effect its purpose of eliminating discrimination in the immigration system, Congress stripped the Immigration Act of all provisions expressly authorizing national origin-based invidious discrimination and added Section 1152(a)(1)'s prohibition on discrimination in the issuance of visas based on nationality and other immutable characteristics, such as race. As evidenced by Section 1152(a)(1), disregarding national origin in selecting which immigrants to admit to the United States remains a core principle of United States immigration policy. Far from evidencing "any clear indication" that Congress intended the President to have the authority to exercise his Section 1182(f) powers based on invidious discrimination, the "object and policy" of the Immigration Act suggest that Congress *did not* intend to grant the President unbridled authority to engage in invidious discrimination when deciding whether and to what extent to suspend alien entry.[11]

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[11] The Government points to a number of orders promulgated by Presidents pursuant to their authority under Section 1182(f) as evidence that that statutory provision authorizes the President to engage in national origin-based discrimination. But the previous orders the Government cites materially differ from Section 2(c), in that they did not suspend the entry of classes of aliens based on national origin alone, let alone use national origin as a proxy to suspend the entry of a class of aliens based on another invidiously discriminatory basis, such as religion. *See* Proclamation 8693 (July 24, 2011) (suspending the entry of aliens subject to travel bans issued by the United Nations Security Council's resolution barring member nations from permitting the entry of individuals who threaten peace in various nations); Proclamation 8342 (Jan. 22, 2009) (suspending the entry of senior government officials "who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies,

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In sum, the language of Section 1182(f), related provisions in the Immigration Act, and the "object and

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or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons"); Proclamation 6958 (Nov. 22, 1996) (suspending the entry of "members of the Government of Sudan, officials of that Government, and members of the Sudanese armed forces" based on the Sudanese government's harboring of individuals who attempted to assassinate the Egyptian President in Ethiopia, in violation of Ethiopian sovereignty); Executive Order No. 12,807 (May 24, 1992) (suspending the entry of "undocumented aliens [entering the United States] by sea" during the mass exodus of Haitian nationals fleeing a military coup, often in dangerous and overcrowded sea vessels); Proclamation 5887 (Oct. 22, 1988) (suspending the entry of "officers and employees" of the Nicaraguan government as nonimmigrants to the United States based on the Nicaraguan government's "unjustified expulsion" of American diplomats and "long-standing . . . suppression of free expression and press and support of subversive activities throughout Central America"); Proclamation 5829 (June 10, 1988) (suspending the entry of "Panamanian nationals . . . who formulate or implement the policies of Manuel Antonio Noriega and Manuel Solis Palma" due to those officials' act of "preventing the legitimate government . . . from restoring order and democracy" to Panama).

Of the executive orders cited by the government, President Reagan's suspension on the entry of Cuban nationals *as immigrants* comes closest to a nationality-based suspension on alien entry. Proclamation 5517 (Aug. 22, 1986). But that executive action was not challenged as a violation of either Section 1182(f) or Section 1152(a)(1), and therefore the judiciary never had the opportunity to address whether the order complied with those provisions or the Constitution. Nor does a single, unchallenged executive action "demonstrate the kind of consistent administrative interpretation necessar to give rise to a presumption of congressional acquiescence." *Abourezk*, 785 F.2d at 1056.

policy" of the statute do not "explicitly" state, much less provide a "clear indication," that Congress intended to delegate to the President wholly unconstrained authority to deny entry to any class of aliens, including based on invidiously discriminatory reasons. *See Zadvydas*, 533 U.S. at 697. Accordingly, Section 2(c)—which this Court finds was likely borne of the President's animus against Muslims and his intent to rely on national origin as a proxy to give effect to that animus—exceeds the authority Congress conferred on the President in Section 1182(f). As Judge Friendly put it, "Congress could not have intended to make relevant" to the President's exercise of his delegated authority to suspend the entry of aliens "invidious discrimination against a particular race or group." *Wong Wing Hang*, 360 F.2d at 719 (internal quotation marks omitted).

II.

Invidious "discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). Yet the Government asks this Court to hold that, in enacting Section 1182(f), Congress intended to delegate to the President the power to deny entry to a class of aliens based on nothing more than such aliens' race, national origin, or religion.

One might argue, as President Trump seemed to suggest during the campaign, *ante* at 18-21, that *as a matter of statistical fact*, Muslims, and therefore nationals of the six predominantly Muslim countries

covered by the Executive Order, disproportionately engage in acts of terrorism, giving rise to a *factual* inference that admitting such individuals would be detrimental to the interests of the United States. Indeed, viewing the Executive Order in its most favorable light, that is the precisely the rationale underlying Section 2(c). Setting aside the question of whether that *factual finding* is true, or even reasonable—which is, at best, highly debatable given the 180 million people in the countries subject to the suspension on entry and the 1.6 million Muslims worldwide—that is precisely the inference that the Framers of the Constitution and the Reconstruction Amendments concluded was impermissible as a matter of *constitutional law.*[12] *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting). In particular, classifying individuals based solely on their race, nationality, or religion—and then relying on those classifications to discriminate against certain races, nationalities, or religions—necessarily results in placing special burdens on individuals who lack any moral responsibility, a result the Framers deemed

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[12] Our country adheres to the rule of law in preserving core constitutional protections. Thus, when the President can identify no change in circumstances justifying an invidious encroachment on constitutional rights, a simple claim of potential harm to national security does not provide the President with unfettered authority to override core constitutional protections. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that a claim of potential harm to national security does not provide the executive branch with unconstrained authority to override the freedom of the press). Indeed, even the invocation of Congressional war powers to protect national defense do "not remove constitutional limitations safeguarding essential liberties." *Robel*, 389 U.S. at 264-67 (internal quotation marks omitted).

antithetical to core democratic principles and destabilizing to our Republic. *Id.*

Even though the Constitution affords greater latitude to the political branches to draw otherwise impermissible distinctions among classes of aliens, the harm to core constitutional values associated with governmental sanctioning of invidious discrimination—and the harm to citizens stemming from the abridgement of those values—demands evidence of "careful and purposeful consideration by those responsible for *enacting and implementing* our laws" before such discrimination should be sanctioned by the judiciary. *Greene*, 360 U.S. at 507 (emphasis added). Because Congress did not provide any indication—let alone the requisite "explicit" statement—that it intended to delegate to the President the authority to violate fundamental constitutional values of equality in exercising his authority to deny entry to classes of aliens, I reject the Government's proposed construction of Section 1182(f).

In emphasizing the larger constitutional problems raised by construing Section 1182(f) as a delegation of authority to engage in invidious discrimination, we must not forget that the Constitution embraces equality in order to forestall highly personal harms. Plaintiff John Doe #1, a lawful permanent resident, seeks to be reunited with his wife, an Iranian national, whom Section 2(c) bars from entering the United States. As Justice Jackson explained when confronted with another broad delegation of congressional authority over immigration, "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized [the President] to break up the family of [a

lawful permanent resident] or force him to keep his wife by becoming an exile." *Knauff*, 338 U.S. at 551-52 (Jackson, J., dissenting).

THACKER, Circuit Judge, concurring:

I concur in the majority's opinion but write separately for three reasons: (1) I would not consider remarks made by candidate Trump before he took his presidential oath of office; (2) I would nonetheless find that Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of the Second Executive Order ("EO-2") violates the Establishment Clause, based solely on remarks made or sentiments expressed after January 20, 2017; and (3) I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c), as it applies to immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the Immigration and Nationality Act ("INA").

I.

I agree with the majority's conclusion that Appellees have standing to challenge the constitutionality of § 2(c) of EO-2 and that EO-2 likely violates the Establishment Clause. However, in my view, we need not—and should not—reach this conclusion by relying on statements made by the President and his associates before inauguration.

While on the campaign trail, a non-incumbent presidential candidate has not yet taken the oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, and may speak to a host of promises merely to curry favor with the electorate. Once a candidate becomes President, however, the Constitution vests that individual with the awesome power of the executive office while simultaneously imposing constraints on

that power. Thus, in undertaking the Establishment Clause analysis, I believe we should focus our attention on conduct occurring on President Trump's inauguration date, January 20, 2017, and thereafter. Indeed, for the reasons below, looking to pre-inauguration conduct is neither advisable nor necessary.

A.

In confining my analysis to post-inauguration statements and actions, I do not draw on a blank slate. To begin, "the Establishment Clause protects religious expression from *governmental interference*." *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2003) (emphasis supplied). To this end, Establishment Clause jurisprudence has focused on government action rather than "a[] judicial psychoanalysis" of individuals. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). We have neither the right nor the ability to peer inside an official's "heart of hearts"; indeed, we will "not look to the veiled psyche of government officers"—much less that of *candidates* for public office—to divine the purpose of a law. *Id.* at 862-63.

The Government relies on the doctrines of executive privilege and presidential immunity to contend that EO-2 is essentially unreviewable, arguing that courts "should not second-guess the President's stated purpose by looking beyond the policy's text and operation," and that we should instead apply a "presumption of regularity" to his actions. Appellants' Br. 45 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). While I do not agree with this proposition for the reasons ably set forth by Chief Judge

Gregory, I do believe the Supreme Court's decisions in the executive privilege and immunity context support confining our review to statements by the President and his administration made after the inauguration, once the President began operating pursuant to Article II. Those decisions explain that the judiciary's ability to probe official, presidential conduct is related to his discharge of *official* power. *See Clinton v. Jones*, 520 U.S. 681, 703 (1997) ("[W]e have long held that when the President takes *official action*, the Court has the authority to determine whether he has acted within the law." (emphasis supplied)); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) ("It is well established that 'a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any *ordinary individual*.'" (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)) (emphasis supplied)). Indeed, the executive privilege—and, by that token, the separation of powers—applies where the President operates within the executive's core constitutional powers. *See Nixon*, 418 U.S. at 708-09. It follows that a president's conduct after he takes office, but not before, carries the imprimatur of official "government" action, and can only then be considered "government interference" under the Establishment Clause. *Mellen*, 327 F.3d at 376.

B.

For more practical reasons, we should also hesitate to attach constitutional significance to words a candidate utters on the campaign trail. Campaign speeches are inevitably scattered with bold promises, but once the dust settles after an election—when faced with the

reality of the office and with benefit of wise counsel—a newly inducted public official may act with a different philosophy. Presidents throughout history have dialed back or even reversed campaign promises.[1] To be sure, the President's statements regarding Islam before assuming office reveal religious animus that is deeply troubling. *See, e.g.*, J.A. 346 ("Donald J. Trump Statement on Preventing Muslim Immigration," dated December 7, 2015).[2] Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so.

II.

Even without focusing on any campaign rhetoric, the record in this case amply demonstrates the primary purpose of EO-2 was to ban Muslims from entering the

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[1] Indeed, many might argue that this President has repeatedly and regularly dialed back or reversed course on his campaign promises. *See, e.g.*, Priya Krishnakumar et al., *Tracking President Trump's Campaign Promises*, L.A. Times (Apr. 26, 2017), http://www.latimes.com/projects/la-na-pol-trump-100-days-promises/ (reporting President Trump has "scaled back" or "abandoned" 9 out of 31 campaign promises) (saved as ECF opinion attachment).

[2] Given that they were made on the campaign trail, I do not consider as part of my analysis the President's campaign website's archived statements about the plan to ban all Muslims from entering the United States. However, I must note it is peculiar that those statements were removed shortly before we began hearing arguments in this case. *See* Dan Merica, *Trump campaign removes controversial Muslim ban language from website*, CNN (May 8, 2017, 3:37 PM), http://www.cnn.com/2017/05/08/politics/trump-muslim-ban-campaign-website/ (saved as ECF opinion attachment).

United States in violation of the Establishment Clause. I would thus base our Establishment Clause analysis on the morphing of the First Executive Order ("EO-1") into EO-2, the statements of presidential representatives and advisors, the lack of evidence supporting a purported national security purpose, and the text of and logical inconsistencies within EO-2.

The Government argues that we should simply defer to the executive and presume that the President's actions are lawful so long as he utters the magic words "national security." But our system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate. Although the executive branch may have authority over national security affairs, *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)), it may only exercise that authority within the confines of the law, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46, 654-55 (1952) (Jackson, J., concurring); and, of equal importance, it has always been the duty of the judiciary to declare "what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A.

The President issued EO-1 on January 27, 2017. *See* Exec. Order 13,769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 banned citizens of seven majority Muslim nations—Libya, Iran, Iraq, Somalia, Syria, Sudan, and Yemen—from entering the United States. The ban applied to over 180 million Muslims, or just over 10% of the world Muslim popula-

tion, and was executed without input from relevant cabinet officials. Indeed, the President actively shielded certain officials from learning the contents of EO-1: per then-acting Attorney General Sally Yates, the administration advised "the Office of Legal Counsel . . . not to tell the attorney general about [EO-1] until after it was over." *Full Transcript: Sally Yates and James Clapper testify on Russian election interference*, Wash. Post (May 8, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference (saved as ECF opinion attachment).

As Rudy Giuliani, an advisor to the President, explained on January 28, 2017, EO-1 did all this with the *purpose* of discriminating against Muslims. Giuliani was quite clear that the President wanted to enact a "Muslim ban" and had assembled a commission to study how to create a "Muslim ban" legally. J.A. 508. Per Giuliani, EO-1 was the President's attempt at a legal "Muslim ban." *Id.*[3]

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[3] Giuliani is purportedly a member, and claims to be chairman, of an expert legal commission assembled to study how to create a lawful way to ban Muslims from entering the country and an acknowledged advisor to the President. *See* J.A. 508-09. Courts routinely analyze statements and reports from presidential commissions such as the one of which Giuliani is a member. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (citing and quoting President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967) to demonstrate importance of privacy in communications); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing Attorney General's Commission on Pornography to establish state's interest in punishing child pornography possession).

To further this goal, EO-1 suspended the entry of refugees for 120 days but directed the Secretary of State "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." EO-1, § 5(b). The President explained that this exception was designed to give Christians priority in entering the United States as refugees. He said that in Syria,

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the *Christians*. And I thought it was very, very unfair. So we are going to help *them*.

J.A. 462 (emphases supplied).[4] The statements of the President, his advisor, and the text of EO-1 made crystal clear a primary purpose of disfavoring Islam and promoting Christianity.

After the Ninth Circuit upheld the stay of EO-1, the President set about to issue a new executive order. But significantly, in revising the order, the executive branch did not attempt to walk away from its previous

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[4] Presidential statements necessarily shed light on executive policy. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015) (using presidential statement to show United States' position on status of Jerusalem); *Clinton v. City of New York*, 524 U.S. 417, 495-96 (1998) (Breyer, J., dissenting) (relying on presidential statements to demonstrate effect of Line Item Veto Act).

discriminatory order. Instead, it simply attempted to effectuate the same discrimination through a slightly different vehicle—the proverbial wolf in sheep's clothing. Indeed, Press Secretary Sean Spicer confirmed that "[t]he principles of the executive order remain the same," J.A. 379,[5] and the President's Senior Policy Advisor, Stephen Miller, described the changes in the new order as "mostly minor technical differences," *id.* at 339.

B.

The President issued EO-2 on March 6, 2017. *See* Exec. Order 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017). Like its predecessor, EO-2 lacks evidentiary support, is logically inconstant, and evinces an intent to discriminate against Muslims.

1.

First, the Government offers very little evidence in an attempt to support the President's ban of approximately 180 million people. EO-2 claims, "hundreds of persons born abroad have been convicted of terrorism-

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[5] When relevant, the press secretary and other White House Official's statements can represent official government position. *See, e.g.*, *Reynolds v. United States*, 123 S. Ct. 975, 984 (2012) (citing to the Office of the Press Secretary to show President's position on registration of sex offenders who committed offenses before enactment of the Adam Walsh Child Protection and Safety Act of 2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 549 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (relying on Office of the White House Press Secretary's statement to identify official executive policy).

related crimes in the United States" but cites only two such examples, each of which is weakly related, if at all, to the purported purpose of EO-2. EO-2, § 1(h). One example is from Iraq, but, as Iraq is not part of EO-2, it does not support *this* ban at all. The other example involves a child brought to the United States as a two-year-old. As this two-year-old was ultimately radicalized in the United States and not abroad, this case is unrelated to better screening and vetting—the purported purpose of EO-2. *See* Br. for Cato Institute as Amicus Curiae Supporting Appellees at 12-13, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 19, 2017), ECF No. 185; EO-2, § 1(a), (h).

In sharp contrast to the dearth of evidence to support the purported purpose of EO-2, 42 bipartisan former national security officials concluded EO-2 "bear[s] no rational relation to the President's stated aim of protecting the nation from foreign terrorism." Corrected Br. for Former National Security Officials as Amici Curiae Supporting Appellees at 4, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. argued May 8, 2017; filed Apr. 13, 2017), ECF No. 126. In addition, since the issuance of EO-1, a report by the Department of Homeland Security has found that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity," likewise undermining any purported security justification for the Order. J.A. 419.

2.

The Government's untenable position is made even worse by the fact that the Government's purported

justification for EO-2 does not logically support the ban it created. EO-2 reasoned that people coming from the six banned countries posed an increased risk of committing terrorist acts because, according to the Department of State's Country Reports on Terrorism 2015 (the "Country Reports"), "each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and were unwilling or unable "to share or validate important information about individuals seeking to travel to the United States." EO-2, § 1(d); *see* § 1(e) (citing Country Reports). However, given these conditions as the reason for the ban, and based on the Country Reports, two other majority Christian countries—Venezuela and the Philippines—should have logically been included. *See* U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2015 78-85, 297-98, 308-09, 314-15, 352, 380 (June 2016), https://www.state.gov/documents/organization/258249.pdf (excerpts saved as ECF opinion attachment). Neither country is willing and able to help the Government verify information about people attempting to travel to the United States, and both countries have terrorist organizations operating within their boundaries. Therefore, applying the Government's logic, the potential of a terrorist act from a national of Venezuela or the Philippines would also justify a blanket ban on all nationals from these countries. Interestingly, however, the CIA World Factbook reports that Venezuelan population is, at most, 2% Muslim, and the Philippine population is 5% Muslim. *See* Cent. Intelligence Agency, *Field Listings: Religions*, World Factbook, https://www.cia.gov/library/

publications/the-world-factbook/fields/2122.html (last visited May 23, 2017) (saved as ECF opinion attachment). Thus, the Government has not consistently applied the criteria it claims it used, and the reason seems obvious—and inappropriate.

Moreover, if the conditions in the six countries subject to EO-2 truly motivated the Government's travel ban, the Government would have based its ban on *contact* with the listed countries, not *nationality*. Under EO-2, a person who is a citizen of Syria would not be allowed to enter the United States even if they had never set foot in Syria. However, a person who lived his or her whole life in Syria but never obtained Syrian citizenship, and had even recently lived near terrorist-controlled regions of Syria, would be unaffected and freely allowed to enter the United States.[6] As a result, EO-2 is at once both overinclusive and underinclusive and bears no logical relationship to its stated objective.

Last, but by no means least, EO-2 identifies and discriminates against Muslims on its face. It identifies only Muslim majority nations, thus banning approximately 10% of the world's Muslim population from entering the United States. It discusses only Islamic terrorism. And, it seeks information on honor killings

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[6] Syrian citizenship is not based on country of birth. *See* Legislative Decree 276-Nationality Law [Syrian Arab Republic], Legislative Decree 276, 24 November 1969. Therefore, a person can have Syrian citizenship without ever setting foot in the country and a person who lives in Syria for their entire lifetime may not have Syrian citizenship.

—a stereotype affiliated with Muslims[7]—even though honor killings have no connection whatsoever to the stated purpose of the Order.[8]

C.

All of this evidence—arising after January 20, 2017—leads to only one conclusion: the principal motivation for the travel ban was a desire to keep Muslims from entering this country. EO-2 does not pass constitutional muster. Our constitutional system creates a strong presumption of legitimacy for presidential action; however, this deference does not require us to cover our eyes and ears and stand mute simply because a president incants the words "national security." The Constitution and our system of democracy requires that we ensure that any and every action of the President complies with the protections it enshrines.

III.

Finally, I would conclude Appellees have demonstrated a likelihood of success on the merits of their argument that Section 2(c) of EO-2, as it applies to

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[7] Honor killings, in which family members kill one of their own (usually a woman) under the belief that the murder is necessary to vindicate the family's honor, occur within societies of many faiths and, notably, in countries that were not subject to either Executive Order. *See* Kimberly Winston, *Activists: Trump Call for Honor Killings Report Targets Muslims*, USA Today (March 7, 2017, 3:06 PM), https://www.usatoday.com/story/news/2017/03/07/activists-trump-call-honor-killings-report-targets-muslims/98861230/ (saved as ECF opinion attachment).

[8] EO-1 also sought information on honor killings. *See* EO-1 § 10(a)(iii).

immigrant visas, violates 8 U.S.C. § 1152(a)(1)(A) of the INA.[9]

Section 1182(f) of Title 8 states that the President may "suspend the entry of all aliens or any class of aliens" "for such period as he shall deem necessary" when the President finds that such entry "would be detrimental to the interests of the United States." However, § 1152(a)(1)(A), which was promulgated after § 1182(f), states that no person seeking an immigrant visa[10] "shall . . . be discriminated against" on the basis of "nationality." To be sure, EO-2 discriminates on the basis of nationality, suspending entry of "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen" (the "Designated Countries"). EO-2, § 2(c). The crux of the Government's argument, however, is that § 1152(a)(1)(A) does not prevent the President, acting pursuant to his § 1182(f) authority, from suspending *entry* based on nationality, even if that suspension necessarily mandates the denial of immigrant visas based on nationality. This is nonsensical. I find this argument to contravene longstanding canons of statutory construction as well as the text and effect of EO-2 itself.

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[9] I join in Part I of Judge Keenan's opinion, concluding that the plaintiffs possess standing to bring a claim under the INA.

[10] Immigrant visas are issued to persons seeking admission to the United States with the goal of obtaining lawful permanent residence status. *See* 8 U.S.C. §§ 1101(a)(15), (20), 1201(a)(1)(A). Those seeking admission for other purposes, such as business, study, or tourism, typically receive nonimmigrant visas. *See id.* §§ 1101(a)(15), 1201(a)(1)(B). I would decline Appellees' invitation to extend § 1152(a)(1)(A) to nonimmigrant visas.

A.

Our jurisprudence gives ample guidance for a situation in which two statutes conflict with one another. But the Government believes § 1182(f) and § 1152(a)(1)(A) do not conflict at all. Instead, the Government posits that the two statutes "address different activities handled by different government officials." Appellants' Br. 31 (internal quotation marks omitted). The Government thus believes the specific visa denial warranted by EO-2 falls squarely within the broad ambit of § 1182(f).

I will first address whether we are faced with any real conflict between these provisions. "When two acts touch upon the same subject, both should be given effect if possible." *United States v. Mitchell*, 39 F.3d 465, 472 (4th Cir. 1994) (citation omitted). And "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). We must "fit, if possible, all parts into an harmonious whole." *Id.* (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). In this vein, 8 U.S.C. § 1201(g) provides, "No visa . . . shall be issued to an alien . . . ineligible to receive a visa . . . under section 1182. . . . " Thus, when a President suspends entry to a national from a Designated Country and renders him inadmissible under § 1182(f), there is a strong argument that the alien *must be* denied a visa. *See generally* 8 U.S.C. § 1182 (titled "Inadmissible aliens"). To conclude that the

two statutes operate independently and deal with totally separate executive functions would be to ignore this link.

Furthermore, although the Government contends the provisions at issue do not touch upon the same subject—asserting that the visa issuance process is a "different activity" than suspension of entry—its own arguments and the text and operation of EO-2 belie this notion.

EO-2 directs that the entry of nationals of the Designated Countries be suspended, but the Government admits the Department of State will "implement th[e] suspension [of entry] by *declining to issue visas* to aliens who are covered by the Order and who are not found eligible for a waiver." Appellants' Br. 34 n.12 (emphasis supplied); *see also* J.A. 729 (Government counsel admitting immigrant visa applicants "will be denied a visa if they are a national from the listed country"). EO-2 also delineates who is entitled to or restricted from entry *based on* one's visa status. *See* EO-2, § 3(a) (defining the scope of entry suspension to those outside the United States on the effective date of the order who "did not have a valid visa" on the date of the now-revoked first executive order; and "do not have a valid visa" as of the effective date of EO-2). Further, the Government offers the precarious justification that "when an alien subject to [EO-2] is denied an immigrant visa, he is not suffering discrimination on the basis of nationality of the sort prohibited by Section 1152(a)(1)(A); instead, he is being denied a visa because he has been validly barred from entering the country." Appellants' Br. 33. Following this circular logic, an

alien is barred from entry because he does not have and cannot attain a visa, but he is denied a visa because he is barred from entry. It is clear that in EO-2, the visa issuance and entry concepts are intertwined to the point of indistinguishability.[11]

The Government also contends it would be a "fruitless exercise" and would "make no sense" to enable issuances of immigrant visas pursuant to § 1152(a)(1)(A), when those aliens receiving the visas would nonetheless be barred from entering the United States once they reach our borders. Appellants' Br. 31, 35. I fail to see how permitting a national of one of the Designated Countries to continue with her immigrant visa process would be fruitless, unless, of course, the Government intends to use the ban as a gateway to a much more permanent ban, ultimately sweeping in those nationals whose processes were halted by the order. *See* Section 1(a) (stating that a "Policy and Purpose" of the EO-2 is to improve the protocols and procedures "associated with the visa-issuance process"). Moreover, being a visa holder, even if one maybe temporarily inadmissible, carries with it a certain status with regard to EO-2. *See, e.g.*, EO-2, § 3(c) (suggesting that one receiving a visa from U.S. Customs and Border Protection during the protocol review period could gain entry to the United States).

I likewise fail to see how allowing one to continue with her incipient visa process would "make no sense,"

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[11] Indeed, Section 3 of EO-1, the predecessor to EO-2's Section 2, was entitled "Suspension of *Issuance of Visas* and Other Immigration Benefits to Nationals of Countries of Particular Concern."

when that national could be one step closer to ultimately reuniting with her loved ones. For example, in the case of John Doe #1, his wife could conceivably proceed with her visa application interview, obtain her visa, and once the protocol review period has ended, join her husband in the United States as soon as possible thereafter, quickly redressing John Doe #1's constitutionally cognizable injury of being separated from an immediate family member.

For all of these reasons, I would reject the Government's argument that § 1152(a)(1)(A) and § 1182(f) operate in separate statutory spheres. I believe § 1152(a)(1)(A)'s prohibition limits the President's § 1182(f) authority in the issuance of EO-2. As the Government itself mentioned in its opening brief, "courts judge the legitimacy of a law by what it says and does." Appellants' Br. 2. Here, the ultimate effect of what EO-2 actually *does* is require executive agencies to deny visas based on nationality.

Therefore, I next turn to the traditional canons of statutory construction to determine how to resolve this tension between § 1182(f) and § 1152(a)(1)(A). I approach this analysis mindful that the executive branch's authority over immigration affairs is conferred and cabined by Congress. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (The Executive's "broad discretion over the admission and exclusion of aliens . . . extends only as far as the statutory authority conferred by Congress.").

B.

When faced with provisions that apparently conflict, we must give effect to each provision, with a later enacted, more specific statute trumping an earlier, more general one. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").

First, § 1152(a)(1)(A) must be given effect. Reading § 1182(f) as bestowing upon the President blanket authority to carry out a suspension of entry, which involves rejecting a particular country's immigrant visa applications as a matter of course, would effectively nullify the protections in § 1152(a)(1)(A) and create an end-run around its prohibitions against discrimination. It would collapse the statutory distinction between entry and visa issuance, *see* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted [to] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law."), and ultimately allow the chief executive to override any of Congress's carefully crafted visa criterion or grounds for inadmissibility.

Second, § 1182(f) was enacted in 1952, but § 1152(a)(1) was enacted in 1965 as part of a sweeping amendment of the INA. We assume that "when Congress enacts

statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010). Thus, we must accept that Congress knew about the President's broad authority in § 1182(f) when it enacted § 1152(a)(1)(A), and the latter lists several exceptions, none of which include the former. *See* § 1152(a)(1)(A) (exempting §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153). Section 1152(a)(1)(A) is also more specific, applying to demarcated types of discrimination and a certain type of visa. *See Radzanower*, 426 U.S. at 153 (preference should be given to statute involving a "narrow [and] precise . . . subject").

Finally, the Government's suggestions of potential statutory discord are unconvincing. For example, the Government relies on 8 U.S.C. § 1185(a)(1), which makes it unlawful for any alien to enter the United States "except under such reasonable rules, regulations, and orders, and subject to such limitations" prescribed by the President. But this provision merely acts as an implementation provision flowing from § 1182(f), which, as stated above, is limited by § 1152(a)(1)(A). In addition, § 1152(a)(1)(B) is of no concern to this analysis given that it applies to the Secretary of State, and § 2(c) of EO-2 bars visa issuance to nationals of the Designated Countries, rather than regulating visa processing locations.

C.

For these reasons, I find Appellees' statutory argument that EO-2 violates § 1152(a)(1)(A) because it requires the denial of immigrant visas on the basis of nationality the more compelling argument. Therefore, I would conclude that Appellees have shown a likeli-

hood of success on the merits on this point. I otherwise join Judge Keenan's opinion, with the exception of Part II.A.i.

IV.

In conclusion, I believe the district court's injunction should be affirmed based on the majority's Establishment Clause conclusion, although I would do so based only on consideration of post-inauguration conduct. I also believe that the plaintiffs will likely succeed on the merits of their argument that EO-2 violates the INA for the reasons stated by Judge Keenan and set forth in Part III of this opinion.

NIEMEYER, CIRCUIT JUDGE, with whom JUDGE SHEDD and JUDGE AGEE join, dissenting:

The district court issued a nationwide preliminary injunction against Executive Order No. 13,780 issued by President Donald Trump on March 6, 2017, to suspend temporarily, while vetting procedures could be reviewed, the entry of aliens from six countries, reciting terrorism-related concerns. While the court acknowledged the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to enter the Order and also acknowledged that the national security reasons given on the face of the Order were legitimate, the court refused to apply *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which held that courts are precluded from "look[ing] behind" "facially legitimate and bona fide" exercises of executive discretion in the immigration context to discern other possible purposes, *id.* at 770. Relying on statements made by candidate Trump during the presidential campaign, the district court construed the Executive Order to be directed against Muslims because of their religion and held therefore that it likely violated the Establishment Clause of the First Amendment.

I conclude that the district court seriously erred (1) by refusing to apply the Supreme Court's decision in *Mandel*; (2) by fabricating a new proposition of law —indeed, a new rule—that provides for the consideration of campaign statements to recast a later-issued executive order; and (3) by radically extending Supreme Court Establishment Clause precedents. The district court's approach is not only unprecedented, it is totally unworkable and inappropriate under any standard of analysis.

The majority reworks the district court's analysis by applying *Mandel*, albeit contrary to its holding, to defer only to the facial *legitimacy* of the Order but not to its facial *bona fides*, despite the *Mandel* Court's holding that "when the Executive exercises this power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of the plaintiffs. *Mandel*, 408 U.S. at 770 (emphasis added). In addition, the majority, after violating *Mandel*, then adopts the same new rule of law adopted by the district court to consider candidate Trump's campaign statements to find the Executive Order's stated reasons "pretext[ual]," *ante* at 51, and then to rewrite the Order to find it in violation of the Establishment Clause. This too is unprecedented and unworkable.

Accordingly, I respectfully dissent. I would vacate the district court's injunction.

I

A

The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, requires that an alien, to obtain admission into the United States, must normally both possess a visa and be admissible upon his or her arrival at a port of entry, *id.* §§ 1181, 1182(a)(7), 1201(h).

Exceptions exist which allow for entry without a visa. For instance, Congress has established a Visa Waiver Program, which allows nationals of certain countries to seek temporary admission into the United States for

90 days or less. 8 U.S.C. § 1187. In December 2015, however, Congress excluded aliens from admission under this program who are dual nationals of or have recently visited Iraq, Syria, any country designated by the Secretary of State to be a state sponsor of international terrorism, or any country that the Secretary of Homeland Security has deemed to be a country or area of concern. Pub. L. No. 114-113, div. O, tit. II, § 203, 129 Stat. 2988, 2989-91 (2015) (codified at 8 U.S.C. § 1187(a)(12)). At all times relevant to this litigation, the countries designated by the Secretary of State to be state sponsors of international terrorism have been Iran, Sudan, and Syria. U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 4, 299-302 (June 2016), https://perma.cc/KJ4B-E4QZ. Also, in February 2016, the Department of Homeland Security ("DHS") excluded recent visitors to and nationals of Libya, Somalia, and Yemen from the Program. DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://perma.cc/87CZ-L4FU.

Even when an alien possesses a visa, the alien must also be *admissible* to the United States when arriving at a port of entry. Congress has accorded the President broad discretion over the admission of aliens, providing in 8 U.S.C. § 1182(f):

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or

> nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

In addition, Congress has specified that the entry of aliens is governed by "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

B

On January 27, 2017, the President issued Executive Order 13,769, 89 Fed. Reg. 8977, which was challenged in several courts. A district court in Washington enjoined nationally the enforcement of several provisions of that order, *see Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and the Ninth Circuit declined to stay the district court's injunction pending appeal, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

Rather than challenge that decision further, the President issued a revised order—Executive Order 13,780—on March 6, 2017, entitled, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13,209, which is the Order before us. This Order revoked the earlier order and rendered moot the challenge to the earlier order.

The first Section of the revised Executive Order announces the policy goals of "protect[ing] the Nation from terrorist activities by foreign nationals" by "improv[ing] the screening and vetting protocols and procedures associated with the visa-issuance process and the [United States Refugee Admissions Program]" that "play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and

in preventing those individuals from entering the United States." Order Preamble, § 1(a).

The Order then recites the previous Administration's response to terrorist activities in the countries covered by the current Order:

> Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen . . . had [during the prior Administration] already been identified as presenting heightened concerns about terrorism and travel to the United States. . . . [And] [i]n 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of . . . statutory factors related to terrorism and national security. . . . Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

Order § 1(b)(i). Describing further the threats posed generally by these nations, the Order states:

> Nationals from the countries previously identified . . . warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the signifi-

> cant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

Order § 1(d). Finally, the Order describes as follows "the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States," relying on the Department of State's *Country Reports of Terrorism 2015*:

> (i) Iran. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and . . . al Qa'ida. . . . Iran does not cooperate with the United States in counterterrorism efforts.
>
> (ii) Libya. Libya is an active combat zone. . . . In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. . . . The United States Embassy in Libya suspended its operations in 2014.
>
> (iii) Somalia. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Soma-

lia has porous borders, and most countries do not recognize Somali identity documents. . . .

(iv) Sudan. Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas . . . [and it] provided safe havens for al-Qa'ida and other terrorist groups to meet and train. . . . [E]lements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) Syria. Syria has been designated as a state sponsor of terrorism since 1979. [Although] [t]he Syrian government is engaged in an ongoing military conflict against ISIS[,] . . . ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) Yemen. . . . Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited [internal] conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations. . . .

Order § 1(e). Based on this collection of information, the Order concludes that, "[i]n light of the conditions in

these six countries, until [an] assessment of current screening and vetting procedures . . . is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Order § 1(f).

The operative provisions, as relevant here, are stated in Section 2 of the Order, which directs the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." Order § 2(a). The Secretary of Homeland Security is then directed to present a report with his findings to the President. Order § 2(b). And finally, pending the review, the Order prohibits the entry of certain nationals from the six countries, as follows:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C.

> 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

Order § 2(c).

The referenced limitations in Section 3 specify that the suspension does not apply to nationals of the designated countries who are inside the United States on the effective date of the Order (March 16, 2017) or who had a valid visa at 5:00 p.m. on January 27, 2017 or on the effective date of the Order. Order § 3(a). The Section goes on to create exceptions that allow the entry of lawful permanent residents of the United States, foreign nationals with valid travel documents that are not visas, dual nationals traveling on passports issued by a non-designated country, foreign nationals traveling on diplomatic visas, foreign nationals granted asylum, refugees already admitted to the United States, and any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture. Order § 3(b). Finally, Section 3 allows consular officers or the Commissioner of U.S. Customs and Border Protection to "decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying

entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest." Order § 3(c).

In sum, nationals of the designated countries who lack visas were, prior to the Order, unable to enter the United States under the Visa Waiver Program, 8 U.S.C. § 1187. Nationals who possess visas are exempted from the Order, as are most other nationals who have the ability to enter the United States through another travel document. *See* Order §§ 2, 3. The Order thus affects nationals of the designated countries who, lacking visas, were already unable to enter the United States but who had hoped to obtain a visa and to enter the United States within the 90 day period of the Order.[1]

C

The plaintiffs are three organizations and six individuals. Two of the organizations, the International Refugee Assistance Project ("IRAP") and HIAS, Inc., provide legal assistance and aid to refugees, while the third organization, the Middle East Studies Association ("MESA"), is an organization of students and scholars of Middle Eastern studies. The six individual plaintiffs are U.S. citizens or lawful permanent residents who alleged that the Order would prevent or delay foreign-national family members from entering the United States.

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[1] Other portions of the Order, not at issue here, suspend adjudication of applications under the Refugee Program for 120 days, subject to case-by-case waivers, and limit to 50,000 the number of refugees admitted in fiscal year 2017. Order § 6(a)-(c).

On March 10, 2017, after Executive Order 13,780 was issued but before it went into effect, the plaintiffs filed their operative complaint, as well as a motion for a preliminary injunction to enjoin enforcement of the Order. They alleged, as relevant here, that the Order violates the Establishment Clause of the First Amendment and 8 U.S.C. § 1152(a), which prohibits discrimination based on nationality in issuing immigrant visas. After expedited briefing and argument, the district court entered a nationwide preliminary injunction that barred enforcement of Section 2(c) of the Order.

The district court began its analysis by concluding that at least three of the individual plaintiffs had standing.

On the merits, the court concluded that the plaintiffs were likely to succeed on their claim that the Order violated the Establishment Clause. Although the court acknowledged that "the Second Executive Order is facially neutral in terms of religion" and that "national security interests would be served by the travel ban," it nonetheless looked behind the Order to statements made during the presidential campaign by candidate Trump and concluded, based on these statements, that the Order was likely motivated by anti-Muslim animus. In looking behind the Order, the court refused to apply *Mandel*, stating as its reason that *Mandel* applied to the review of decisions by immigration officers denying visas and "does not apply to the promulgation of a sweeping immigration policy at the highest levels of the political branches."

The district court also found that the plaintiffs were likely to succeed on a small portion of their statutory

claim, concluding that the Order conflicted with federal law insofar as it had "the specific effect of halting the issuance of [immigrant] visas to nationals of the Designated Countries." Otherwise, it found that "an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) [did] not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas." (Internal quotation marks omitted).

From the entry of the preliminary injunction, the government filed this appeal.

II

In affirming the district court's ruling based on the Establishment Clause, the majority looks past the face of the Order's statements on national security and immigration, which it concedes are neutral in terms of religion, and considers campaign statements made by candidate Trump to conclude that the Order denigrates Islam, in violation of the Establishment Clause. This approach (1) plainly violates the Supreme Court's directive in *Mandel*; (2) adopts a *new rule of law* that uses campaign statements to recast the plain, unambiguous, and religiously neutral text of an executive order; and (3) radically extends the Supreme Court's Establishment Clause holdings. I address these legal errors in turn.

A

I begin with the majority's failure faithfully to apply *Mandel*.

In *Mandel*, Ernest Mandel, a Belgian citizen, was denied a nonimmigrant visa to enter the United States to participate in conferences and to give speeches. In denying his admission to the United States, the Attorney General relied on 8 U.S.C. §§ 1182(a)(28)(D), (G)(v) and 1182(d)(3)(A), which provided that aliens who advocate or publish "the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship" shall be excluded from admission to the United States unless granted a waiver by the Attorney General. Mandel admitted that he was a Marxist who advocated the economic, governmental, and international doctrines of world communism, and the Attorney General refused to grant him a waiver. *Mandel*, 408 U.S. at 756, 759. University professors in the United States, who had invited Mandel to the United States to speak, as well as Mandel himself, filed an action challenging the constitutionality of the relevant statutory provisions and the Attorney General's exercise of his authority under those provisions. *Id.* at 759-60. They alleged that the relevant statutory provisions and the Attorney General's denial of a waiver were unconstitutional because they deprived the American plaintiffs of their First Amendment rights to hear and meet with Mandel. *Id.* at 760.

Despite its conclusion that the professors' First Amendment rights were well-established, the Supreme Court held that Mandel's exclusion was lawful. At the

outset, the Court explicitly accepted that Mandel's exclusion implicated the First Amendment. It found, however, that its "[r]ecognition that First Amendment rights are implicated . . . [was] not dispositive of [its] inquiry." *Mandel*, 408 U.S. at 765. The Court stated that, based on "ancient principles of the international law of nation-states," Congress could categorically bar those who advocated Communism from entry, explaining that "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Id.* The Court repeated Justice Harlan's holding that the government's power "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." *Id.* at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)).

The Court then rejected the argument that the Attorney General's denial of a waiver violated the First Amendment. The Court forbade judges from interfering with the executive's "facially legitimate and bona fide" exercise of its immigration authority or balancing that exercise against constitutional rights. *Mandel*, 408 U.S. at 770. Specifically, it recognized that "Congress has delegated conditional exercise of this power [of exclusion] to the Executive" and declined to apply

more scrutiny to executive exercise of that power than it would to Congress's own actions. *Id.* It concluded:

> We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, *the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests* of those who seek personal communication with the applicant.

Id. (emphasis added).

The holding of *Mandel* ineluctably requires that we vacate the district court's preliminary injunction. The similarities between *Mandel* and this case are numerous and significant. In both cases, Congress delegated power to the executive to prohibit the entry of a certain class of foreign nationals. 8 U.S.C. § 1182(a)(28)(D), (d)(3)(A) (1970); 8 U.S.C. § 1182(f) (2016). The plaintiffs in each case challenged the executive's exercise of that statutory discretion as violative of their individual First Amendment rights. The court in *Mandel* rejected this challenge because, even assuming a constitutional violation lurked beneath the surface of the executive's implementation of his statutory authority, the reasons the executive had provided were "facially legitimate and bona fide." We must thus reject this similar challenge today.

The Court has consistently reaffirmed and applied *Mandel*'s holding. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court declined to scrutinize a statute that gave different immigration status to a child born out of wedlock depending on whether it was the child's mother

or father who was a citizen or lawful permanent resident. Although that statute involved two suspect classifications—gender and legitimacy—the Court, citing *Mandel*, nonetheless concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. *Id.* at 799. Accordingly, in response to the plaintiffs' arguments that the distinction was based "on an overbroad and outdated stereotype," the Court indicated that "this argument should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.

And both *Mandel* and *Fiallo* were reaffirmed more recently in Justice Kennedy's opinion in *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment). In *Din*, the Court considered a suit by a United States citizen who alleged that the government deprived her of a liberty interest protected under the Due Process Clause by denying her husband's visa application without adequate explanation, providing only a citation to the provision under which the visa was denied. Justice Kennedy, writing for himself and Justice Alito to provide the fourth and fifth votes in favor of the government, stated that "[t]he reasoning and the holding in *Mandel* control here" and that the reasoning of *Mandel* "has particular force in the area of national security." *Id.* at 2140. He concluded that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that, because the government had provided Din with a facially legitimate and bona fide reason for its action, Din had no viable constitutional claim. *Id.* at 2141.

The plaintiffs can provide no coherent basis for their assertion that this case is not controlled by *Mandel* and its progeny. They do argue that the holding of *Mandel* does not apply to claims under the Establishment Clause, but they are unable to point to any case in which the Supreme Court has ever suggested the existence of such a limitation, or, indeed, any case in which it has suggested that some areas of law are not governed by the rule laid out in *Mandel*. Absent such a case, we are not now at liberty to craft—out of whole cloth—exceptions to controlling Supreme Court precedents.

To reach its conclusion, the majority does not adopt the plaintiffs' broad argument that *Mandel* does not even apply. Instead, in its attempt to escape *Mandel*'s clear holding, it asserts that "[w]here plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith," the court may "step away from our deferential posture and look behind the stated reason for the challenged action" to attempt to discern the action's purpose. *Ante* at 50. This approach, which totally undermines *Mandel*, is the foundation of its new rule that campaign statements may be considered to recast an unambiguous, later-adopted executive order on immigration. The majority states that even though the Order is on its face legitimate and provides reasons rooted in national security, because the plaintiffs "have more than plausibly alleged" bad faith, "we no longer defer" to the Order's stated purpose "and instead may 'look behind' [the Order]" in an attempt to discern whether the national security reason was *in fact* pro-

vided as a pretext for its religious purpose. *Ante* at 52. This approach casually dismisses *Mandel*, *Fiallo*, and *Din*.

If the majority's understanding had been shared by the Supreme Court, it would have compelled different results in each of *Mandel*, *Fiallo*, and *Din*, as in each of those cases the plaintiffs alleged bad faith with at least as much particularity as do the plaintiffs here. In *Mandel*, the allegations were such that Justice Marshall, writing in dissent, observed that "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham." *Id.* at 778 (Marshall, J., dissenting). In *Fiallo*, Justice Marshall, again writing in dissent, pointed to the fact that the statute in question relied on "invidious classifications." *Fiallo*, 430 U.S. at 810 (Marshall, J., dissenting). And in *Din*, the plaintiffs argued that the consular decision should be reviewed because it fell within the "limited circumstances where the government provides no reason, or where the reason on its face is illegitimate." Brief for Respondent at 31, *Din*, 135 S. Ct. 2128 (No. 13-1402), 2015 WL 179409. But, as those cases hold, a lack of good faith must appear on the face of the government's action, not from looking behind it.

As support for its dramatic departure from Supreme Court precedent, the majority relies on a scattershot string of quotations drawn out of context from one sentence in *Din*. The carelessness of the majority's presentation is demonstrated simply by a comparison of its characterization of *Din* and the actual language

of *Din* taken in context. Here is how the majority characterizes *Din*:

> Justice Kennedy explained that where a plaintiff makes **"an affirmative showing of bad faith"** that is **"plausibly alleged with sufficient particularity,"** courts may **"look behind"** the challenged action to assess its "facially legitimate" justification.

Ante at 50. And here is what Justice Kennedy in *Din* actually said, with the language quoted by the majority in bold:

> Absent **an affirmative showing of bad faith** on the part of the consular officer who denied Berashk a visa—which Din has not **plausibly alleged with sufficient particularity**—*Mandel* instructs us not to **"look behind"** the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed.

Din, 135 S. Ct. at 2141 (emphasis added).

More problematic is the majority's misunderstanding of *Din*'s actual holding, which the majority tries to reshape for its own ends. In *Din*, when the plaintiff refused to accept the curt explanation of why her husband was denied a visa, she claimed that due process required that the government disclose the factual basis for its determination. Faced with Din's request for these underlying facts, the Supreme Court declined, instead applying *Mandel*'s requirement that the plaintiff must show that the government's reasons were not *facially* legitimate and not *facially* bona fide. As Justice Kennedy explained:

> Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis.
>
> * * *
>
> Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular office relied.
>
> * * *
>
> [But] the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. [Citing *Fiallo*, 430 U.S. at 795-96]. And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this.
>
> * * *
>
> For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a *facially legitimate and bona fide reason* for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). *By requiring the Government to provide more, the Court of Appeals erred* in adjudicating Din's constitutional claims.

Din, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in judgment) (emphasis added) (citations omitted). Nowhere did the *Din* Court authorize going behind the government's notice for the purpose of showing bad faith. The plaintiff had to show *facially* that the notice was in

bad faith, *i.e.*, not bona fide. The majority's selective quotations from *Din*, which conceal *Din*'s faithful application of *Mandel*, are simply misleading. Indeed, the impetus for the majority's approach is revealed when it states, "If we limited our purpose inquiry to review of the operation of a *facially neutral* order, we would be caught in an analytical loop, where the order would always survive scrutiny." *Ante* at 62 (emphasis added). That consequence—that facially neutral executive orders survive review—is precisely what *Mandel* requires.

In looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited. *Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion in search of circumstantial evidence of alleged bad faith. The majority, now for the first time, rejects these holdings in favor of its politically desired outcome.

B

Considering the Order on its face, as we are required to do by *Mandel*, *Fiallo*, and *Din*, it is entirely without constitutional fault. The Order was a valid exercise of the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a) to suspend the entry of "any aliens" or "any class of aliens" and to prescribe "reasonable rules, regulations, and orders" regarding entry, so long as the President finds that the aliens' admission

would be "detrimental to the interests of the United States." And Executive Order No. 13,780 was not the first to be issued under this authority. Such orders were entered by Presidents Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama.[2] Moreover, the particular reasons given for the issuance of the Executive Order respond directly to the described risk of terrorism from six countries, justifying the imposition of a 90-day pause in the admission of nationals from those countries while the Administration determines whether existing screening and vetting procedures are adequate.

The Executive Order begins by noting that the previous Administration, in conjunction with Congress, identified seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—"as presenting heightened concerns about terrorism and travel to the United States," specifically noting that the previous Administration's Secretary of Homeland Security designated Libya, Somalia, and Yemen as countries of concern for travel purposes based on terrorism and national security. Order § 1(b)(i). And finally it notes that Members of Congress had expressed concerns about "screening

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[2] *See, e.g.*, Exec. Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981) (Reagan); Proclamation 5,517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Reagan); Exec. Order 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (George H.W. Bush); Proclamation 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996) (Clinton); Proclamation 7,359, 65 Fed. Reg. 60,831 (Oct. 10, 2000) (Clinton); Executive Order 13,276, 67 Fed. Reg. 69,985 (Nov. 15, 2002) (George W. Bush); Exec. Order 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (Obama); Exec. Order 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016) (Obama).

and vetting procedures" following terrorist attacks in 2016 in Europe, as well as in this country. *Id.*

Adding to the historical assessment of those risks, the Executive Order continues with its conclusions, based on additional data, that the conditions in the countries previously identified had worsened, at least with respect to six of the seven countries (excepting Iraq), noting that some of those countries were state sponsors of terrorism or were significantly compromised by terrorist organizations. Several of the countries were unwilling or unable to share or validate information about nationals seeking to travel to the United States, and in some, the conditions increasingly enabled "terrorist operatives or sympathizers to travel to the United States." Order § 1(d).

Finally, the Order addresses the particular circumstances of each of the six countries covered by the Order, noting for example, that Iran, Sudan, and Syria were state sponsors of terrorism; that the governments in Libya, Somalia, and Syria were rendered partially or entirely unable to resist terrorist organizations because of the organizations' activities; and that Iran, Libya, Syria, and Yemen either were not cooperating with the United States in its counterterrorism efforts or were unable to do so.

None of the facts or conditions recited as reasons for the issuance of the Executive Order have been challenged as untrue or illegitimate. Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive Order, they would have had no problem with the Order.

As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional." Similarly, the district court found the face of the Order to be neutral in terms of religion. And the majority too so concludes. *Ante* at 52, 59.

Moreover, these reasons amply support the modest action taken by the Executive Order, which imposes only a temporary pause of 90 days to assess whether the screening and vetting procedures that are applied to nationals from these high-risk countries are adequate to identify and exclude terrorists. Even this pause is accompanied by an authorization to issue waivers designed to limit any harmful impact without compromising national security.

While the legitimate justifications for the Order are thoroughly established, its supposed ills are nowhere present on its face. Far from containing the sort of religious advocacy or disparagement that can violate the Establishment Clause, the Order contains no reference to religion whatsoever. Nor is there any trace of discriminatory animus. In short, under *Mandel* and its progeny, Executive Order 13,780 comfortably survives our review.[3]

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[3] The opinions in support of affirmance betray an object beyond a disciplined analysis. Judge Gregory states, for example, that the Executive Order "drips with religious intolerance, animus, and discrimination," *ante* at 12, and Judge Wynn states similarly, "this Executive Order is no more than . . . naked invidious discrimination against Muslims," *ante* at 94. These statements flatly mischaracterize an order that undisputedly contains no facial reference to religion.

C

The majority's new rule, which considers statements made by candidate Trump during the presidential campaign to conclude that the Executive Order does not mean what it says, is fraught with danger and impracticability. Apart from violating all established rules for construing unambiguous texts—whether statutes, regulations, executive orders, or, indeed, contracts—reliance on campaign statements to impose a new meaning on an unambiguous Executive Order is completely strange to judicial analysis.

The Supreme Court has repeatedly warned against "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). And consistent with that warning, the Court has never, "in evaluating the legality of executive action, deferred to comments made by such officials to the media." *Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24 n.52 (2006). The Court's reluctance to consider statements made in the course of campaigning derives from good sense and a recognition of the pitfalls that would accompany such an inquiry.

Because of their nature, campaign statements are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas; they are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise. And they are often ambiguous. A court applying the majority's new rule could thus have free reign to select whichever expression of a candidate's developing ideas best supports its desired conclusion.

Moreover, opening the door to the use of campaign statements to inform the text of later executive orders has no rational limit. If a court, dredging through the myriad remarks of a campaign, fails to find material to produce the desired outcome, what stops it from probing deeper to find statements from a previous campaign, or from a previous business conference, or from college?

And how would use of such statements take into account intervening acts, events, and influences? When a candidate wins the election to the presidency, he takes an oath of office to abide by the Constitution and the laws of the Nation; he appoints officers of the government and retains advisors, usually specialized in their field. Is there not the possibility that a candidate might have different intentions than a President in office? And after taking office, a President faces new external events that may prompt new approaches altogether. How would a court assess the effect of these intervening events on presidential intent without conducting judicial psychoanalysis?

The foibles of such a rule are unbounded and its adoption would have serious implications for the democratic process. As Judge Kozinski said well when he wrote about the Ninth Circuit's use of the same campaign statements:

> Even if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result —namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate. If a court were to find that

> campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official's "heart of hearts" to divine whether he really changed his mind, just as the Supreme Court has warned us not to? *See McCreary*, 545 U.S. at 862.

Washington v. Trump, No. 17-35105 (9th Cir. March 17, 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc).

The danger of the majority's new rule is that it will enable any court to justify its decision to strike down any executive action with which it disagrees. It need only find one statement that contradicts the stated reasons for a subsequent executive action and thereby pronounce that reasons for the executive action are a pretext. This, I submit, is precisely what the majority opinion does.

Moreover, the unbounded nature of the majority's new rule will leave the President and his Administration in a clearly untenable position for future action. It is undeniable that President Trump will need to engage in foreign policy regarding majority-Muslim nations, including those designated by the Order. And yet the majority now suggests that at least some of those future actions might also be subject to the same challenges upheld today. Presumably, the majority does not intend entirely to stop the President from creating policies that address these nations, but it gives

the President no guidelines for "cleansing" himself of the "taint" they have purportedly identified.

Finally, the new rule would by itself chill political speech directed at voters seeking to make their election decision. It is hard to imagine a greater or more direct chill on campaign speech than the knowledge that any statement made may be used later to support the inference of some nefarious intent when official actions are inevitably subjected to legal challenges. Indeed, the majority does not even deny that it employs an approach that will limit communication to voters. Instead, it simply opines remarkably that such chilling is "a welcome restraint." *Ante* at 68.

The Supreme Court surely will shudder at the majority's adoption of this new rule that has no limits or bounds—one that transforms the majority's criticisms of a candidate's various campaign statements into a constitutional violation.

D

Finally, it is readily apparent that the plaintiffs' attempt to use campaign statements to transform a facially neutral executive action into an Establishment Clause violation would, in any event, be unlikely to succeed on the merits.

The thrust of the plaintiffs' argument, which the majority adopts, is that the Order violates the Establishment Clause's requirement of religious neutrality because it was enacted "primarily for the purpose of targeting Muslims." To be sure, courts must ensure that government action is indeed motivated by a secular, rather than religious, purpose. *See Lemon v. Kurtz-*

man, 403 U.S. 602, 612 (1971). And while the government's "stated reasons" for an action "will generally get deference," it is true that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

But these generic standards are all of the doctrinal support that the plaintiffs and the majority can muster. For one, the Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs. And of the few government actions that the Supreme Court has invalidated based on a religious purpose, *McCreary*, 545 U.S. at 859 (remarking that the Court had "found government action motivated by an illegitimate purpose only four times since *Lemon*"), each is manifestly distinguishable from the Order here.

First, for all of the weight that the majority places on *McCreary*, it ignores that the Court there confronted a *facially religious* government action—the display of the Ten Commandments in two county courthouses. The Court in *McCreary* thus began with a *presumption* that the display was intended to promote religion. *See* 545 U.S. at 867-69. When it examined the legislative history surrounding the displays, it did so only to reject the government's attempt to overcome that presumption with a secular, pedagogical purpose—a purpose

that the Court declined to accept because it was adopted "only as a litigating position," *id.* at 871, "without a new resolution or repeal of the old [and expressly religious] one," *id.* at 870; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963) (holding that schools' policy of required Bible study and recitation of the Lord's Prayer violated Establishment Clause). In stark contrast, the district court here concluded, and the majority agrees, that nothing on the face of the Executive Order speaks to religion. *Ante* at 59-60. Under *McCreary*, we should therefore begin with the presumption that the Order is neutral toward religion.

To be sure, the Supreme Court in "unusual cases" will find a religious purpose even where the government action contains no facial reference to religion. *McCreary*, 545 U.S. at 865. The majority, quoting selectively from these cases, invokes them to justify its searching inquiry into whether the Order's secular justifications were subordinate to a religious purpose that it has gleaned only from extrinsic statements. The majority's approach, however, in no way accords with what the Court actually *did* in those cases. In each case, the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins. *See Santa Fe*, 530 U.S. at 315-16 (invalidating school policy of allowing student-led "invocation" before football games because the policy's language and context showed that religious prayer was the "preferred message"); *Edwards v. Aguillard*, 482 U.S. 578, 585-86

(1987) (invalidating state law that required creationism to be taught with evolution because the law did nothing to accomplish its stated secular purpose of "protect[ing] academic freedom"); *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (invalidating state law that provided for one minute of "meditation or voluntary prayer" at the start of each school day because bill's sponsor stated that sole purpose was to encourage school prayer and prior statute already provided for student meditation).

The Executive Order in this case fits nowhere within this line. It is framed and enforced without reference to religion, and the government's proffered national security justifications, which are consistent with the stated purposes of the Order, withstand scrutiny. Conflicting extrinsic statements made prior to the Order's enactment surely cannot supplant its facially legitimate national security purpose. *See McCreary*, 545 U.S. at 865 ("[T]he Court often . . . accept[s] governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims"); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (referring to the Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute"). Indeed, to hold otherwise would fly in the face of the Court's decisions upholding government actions with connections to religion far more obvious than those here. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (city's inclusion of crèche in Christmas display justified by "legitimate secular purposes," namely "to celebrate the Holiday and to depict the origins of that Holiday"); *McGowan v.*

Maryland, 366 U.S. 420, 444-46 (1961) (upholding state's requirement that businesses be closed on Sundays because, while Sunday laws had obvious religious origins, their religious purpose had dissipated in favor of a secular one).

The decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), on which the majority also relies, is similarly inapposite. The state law at issue in that case "carved out" a new school district that included only "a religious enclave of Satmar Hasidism, practitioners of a strict form of Judaism." *Id.* at 690. In *Kiryas Joel*, however, the government did not dispute that the lines were drawn with religion in mind. *Id.* at 699. Rather than searching for extrinsic statements as evidence of a religious purpose, the Court took the government at its word and treated as corroborative of its religious purpose the fact that "the district's creation ran uniquely counter to state practice." *Id.* at 702; *see also id.* at 729 (Kennedy, J., concurring in the judgment) ("There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This *explicit* religious gerrymandering violates the First Amendment Establishment Clause" (emphasis added)).

The government here, by contrast, provides ample nonreligious justification for the Order and actively contests that it has any religious purpose. Far from running "counter" to typical national security practice, each of the Order's six affected countries was previously designated as "a state sponsor of terrorism, has been significantly compromised by terrorist organiza-

tions, or contains active conflict zones." Order § 1(d). And an Order that affects all nationals of six countries, irrespective of their religion, is not so precisely hewn to religious lines that we can infer, based on its operation alone, a predominantly religious purpose.

Undeterred, the majority, pursuing its objective despite the costs, opens *Lemon*'s already controversial purpose inquiry even wider.[4] It engages in its own review of the national security justifications supporting the Order and concludes that protecting national security could not be the President's "primary purpose." As evidence, the majority points to the President's level of consultation with national security agencies before issuing the Order; the content of internal Department of Homeland Security reports; the comments of former national security officials made in an *amicus* brief; and its own assessment of the national security threats described in the Order. *Ante* at 60-62.

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[4] While there is no question that it binds us, *Lemon*'s test, and particularly its inquiry into government purpose, has repeatedly been criticized as open-ended and manipulable. *See McCreary*, 545 U.S. at 902 (Scalia, J., dissenting) ("By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record"); *see also, e.g.*, *Santa Fe*, 530 U.S. at 319-20 (Rehnquist, C.J., dissenting); *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment); *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Should the majority not be wary of jumping when on thin ice?

This intense factual scrutiny of a facially legitimate purpose, of course, flies in the face of *Mandel*, *Fiallo*, and *Din*. But even within traditional Establishment Clause doctrine, it is an unprecedented overreach. It goes far beyond the Court's inquiry in *McCreary*, where the government offered a secular "litigating position" for a *facially religious* action, 545 U.S. at 871, or in *Wallace*, where the government's proffered secular purpose for a statute that provided for "meditation or voluntary prayer" was belied by the fact that a previous law already provided for a minute of meditation, 472 U.S. at 59-61 (finding that the bill's "sole purpose" was religious). In those cases, the Court concluded that the government's secular purpose did not hold up even on its own terms—that is, even accepting the *soundness* of the secular purpose, undisputed historical facts made clear that the secular purpose was not primary. The Court emphatically did not, however, question the *factual bases* underlying the government's proffered secular purpose.

The majority's intense factual inquiry is particularly inappropriate where the government's secular purpose is related to national security—a subject, as the majority recognizes, on which we owe the executive significant deference. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (explaining that, where the executive had concluded that material support to terrorist organizations "will ultimately inure to the benefit of their criminal, terrorist functions," "[t]hat evaluation of the facts by the Executive . . . is entitled to deference" because it "implicates sensitive and weighty interests of national security and foreign affairs").

Unless corrected by the Supreme Court, the majority's new approach, which is unsupported by any Supreme Court case, will become a sword for plaintiffs to challenge facially neutral government actions, particularly those affecting regions dominated by a single religion. Government officials will avoid speaking about religion, even privately, lest a court discover statements that could be used to ascribe a religious motivation to their future actions. And, in the more immediate future, our courts will be faced with the unworkable task of determining when this President's supposed religious motive has sufficiently dissipated so as to allow executive action toward these or other majority-Muslim countries. The Establishment Clause demands none of these unfortunate and unprecedented results.

* * *

For all of the foregoing reasons, I would reject the plaintiffs' and the district court's Establishment Clause arguments and vacate the district court's injunction.

SHEDD, Circuit Judge, with whom Judge NIEMEYER and Judge AGEE join, dissenting[1]:

National security is a complex business with potentially grave consequences for our country. Recognizing this fact, the Supreme Court has observed that "it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).[2] This observation is especially true in today's world, where we face threats from radical terrorists who seek to cross our borders for the purpose of harming us and destroying our way of life. Although we often are quick to forget the fact, "the real risks, the real threats, of terrorist attacks are constant and not likely soon to abate," *Boumediene v. Bush*, 553 U.S. 723, 793 (2008); therefore, "the Government's interest in combating terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Given the multitude of critical factors involved in protecting national security, including the delicacy of foreign relations and the worldwide intelligence information that is constantly generated, combined with the ever-changing threatening circumstances, "questions of national security . . . do not admit of easy answers,

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[1] Though I fully join Judge Niemeyer's and Judge Agee's well-reasoned dissenting opinions, I offer the following additional comments to explain why I believe the district court further abused its discretion in entering the preliminary injunction. Judge Niemeyer and Judge Agee have authorized me to state that they join in this dissenting opinion.

[2] I have omitted internal quotation marks, alterations, and citations here and throughout this opinion, unless otherwise noted.

especially not as products of the necessarily limited analysis undertaken in a single case," *Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012), and "they are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil," *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Every President has the "constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces." *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007). In this role, a President and his national security advisors (unlike federal judges at all levels, lawyers, and commentators) have constant access to information "that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797. For these reasons and more, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dept. of Navy v. Egan*, 484 U.S. 518, 530 (1988).

This case involves the President's attempt to impose a *temporary pause* on the entry of nationals from six countries that indisputably present national security concerns. "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). Along this line, the Supreme Court

has noted that "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), and has explained that the President is not obligated to disclose his reasons "for deeming nationals of a particular country a special threat . . . and even if [he] did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

One thing is certain: to whatever extent it is permissible to examine the President's national security decision in this case, where the President has acted "pursuant to an express or implied authorization from Congress," the President's decision is entitled to "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). This is especially true when, as here, plaintiffs seek preliminary injunctive relief to stop the President from executing a national security policy, for in even the most routine cases, which this certainly is not, a preliminary injunction "is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

The obvious rationale underlying these important principles has been discussed many times by the Supreme Court, this Court, and others, but the district court totally failed to respect them. Rather than giv-

ing any deference to the President (or his national security advisors) regarding his national security assessment, or imposing a heavy burden on the plaintiffs to overcome the President's decision, or showing any sense of restraint in wielding the extraordinary remedy of injunctive relief, the district court simply cast aside the President's decision as nothing more than a sham based on its own ideas concerning the wisdom of the Executive Order. In doing so, the district court made the extraordinary finding—based on a *preliminary* evidentiary record—that the President exercised his otherwise lawful authority to effect the temporary pause primarily because he bears animus towards Muslims and wants to impose a "Muslim ban." Remarkably, the district court made this finding while also acknowledging that the Executive Order is facially neutral, that there are heightened security risks with the countries listed in the Executive Order, and that national security interests would be served by the travel pause.

The shortcomings inherent in the district court's fact-finding are obvious. It is primarily based on the district court's selectively negative interpretation of political campaign statements made before the President swore his oath of office,[3] its acceptance of the

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[3] Ironically, courts are sensitive in defending their own integrity and often use the judicial oath of office as a shield against claims of bias. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("There is a presumption of honesty and integrity in those serving as adjudicators. All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."). Certainly, the President, who takes a similar oath of office, should

national security assessment of *former* government officials (many of whom openly oppose this President), its failure to account for the national security assessment of the *current* Attorney General and Secretary of Homeland Security, its misplaced conclusion regarding the President's decision not to submit the Executive Order to the Executive bureaucracy for "inter-agency review," and the purported novelty of the temporary travel pause. Moreover, despite its express recognition of the dangers posed by the designated countries and the national security interests served by the temporary travel pause, the district court—with no access to intelligence information[4]—criticized the President for failing to identify any instances of individuals who came from the designated countries having engaged in terrorist activity in the United States, faulted the President for not explaining why the temporary travel pause is the necessary response to the existing risks, and ultimately found that the President failed to prove

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be accorded the same trust. *See, e.g., N.L.R.B. v. Enterprise Leas. Co. SE, LLC*, 722 F.3d 609, 671 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part) ("The majority also gives short shrift to the fact that the President too swears an oath to uphold the Constitution, and that when he acts under its express authority, his actions should be accorded a presumption of constitutionality.").

[4] In *Waterman S.S. Corp.*, 333 U.S. at 111, the Court made the following apt observation: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

that national security cannot be maintained without the temporary travel pause. As if all of this is not enough, the President's supposed goal of "banning Muslims" from the United States is not remotely served by the temporary travel pause, a fact that makes the district court's factual finding even more dubious.[5]

The district court's questionable fact-finding is sufficient (among other reasons) to vacate the injunction, but there is ultimately a more obvious fatal flaw in the injunction order: the court's complete failure to actually account for the public interest. In addition to the general restraint courts must show when considering injunctive relief, courts "should be particularly cautious when contemplating relief that implicates public interests." *Salazar v. Buono*, 559 U.S. 700, 714 (2010).[6] Although the public interest generally favors the protection of constitutional rights, that interest must sometimes yield to the public interest in national security, *see, e.g.*, *Defense Distrib. v. U.S. Dept. of State*, 838 F.3d 451, 458-60 (5th Cir. 2016), because "unless a

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[5] The limited temporal and geographical scope of the Executive Order, coupled with the designated categorical exclusions and case-by-case waiver process, strongly supports the President's stated national security rationale rather than the district court's bias finding. Even without those exclusions and waivers, the temporary travel pause would only potentially affect approximately 10% of Muslims worldwide.

[6] To obtain a preliminary injunction, a plaintiff must establish: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Counc., Inc.*, 555 U.S. 7, 20 (2008).

society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning," *Wayte v. United States*, 470 U.S. 598, 612 (1985). This is such a case.

The circumstances of this case are similar in material respects to those presented in *Winter*, and a straightforward application of that case warrants reversal here. The *Winter* plaintiffs complained that the United States Navy's sonar-training program harmed marine mammals and that the Navy should have prepared an environmental impact statement before conducting certain training exercises. The district court agreed and preliminarily enjoined the Navy from using sonar in certain circumstances during training exercises. The Ninth Circuit affirmed the injunction, but the Court reversed. Applying the standard four-part preliminary injunction test, the Court acknowledged the importance of plaintiff's ecological, scientific, and recreational interests in marine mammals and accepted for purposes of discussion that they had shown irreparable injury from the Navy's training exercises. However, the Court concluded that these factors were "outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 23. In the Court's view: "A proper consideration of these factors alone require[d] denial of the requested injunctive relief." *Id.*

The Court explained that the lower courts "significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national

defense." *Id.* at 24. In reaching this conclusion, the Court noted that the case involved complex professional military decisions regarding training and control of a military force, to which "great deference" is ordinarily given, *id.*, and it observed that the record contained declarations from senior Navy officials that underscored the threat posed by enemy submarines and the need for extensive sonar training to counter the threat, as well as a declaration from the President that training with sonar was essential to national security. The Court emphasized that the lower courts "failed properly to defer" to senior Navy officers' judgment about the effect that a preliminary injunction would have on the effectiveness of the training. *Id.* at 27. Additionally, the Court pointed out that "despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion." *Id.* at 26. Ultimately, while acknowledging that "military interests do not always trump other considerations," the Court determined that "the proper determination of where the public interest lies does not strike us as a close question." *Id.*

As in *Winter*, the district court's public interest analysis misses the mark. Here, the facially neutral Executive Order explains in detail the President's underlying reasoning for the temporary travel pause. Additionally, the record contains a joint letter from the Attorney General and Secretary of Homeland Security in which they detail their concerns "about weaknesses in our immigration system that pose a risk to our

Nation's security," and in which they assert that "*it is imperative that we have a temporary pause on the entry of nationals from certain countries to allow this review to take place—a temporary pause that will immediately diminish the risk we face from application of our current vetting and screening programs for individuals seeking entry to the United States from these countries.*" To be sure, the district court found that the *President's* alleged bias is the primary reason for the temporary travel pause, but it found no such bias on the part of his Cabinet officials.[7] Moreover, the district court acknowledged that national security is in fact a secondary reason for the temporary travel pause, and it found that the countries designated in the Executive Order present heightened security risks and that national security interests would be served by the temporary travel pause.

Despite this record, the district court—with no meaningful analysis—simply dismissed the public's interest in national security with the specious conclusion that "Defendants . . . have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." *I.R.A.P. v. Trump*, 2017 Westlaw

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[7] Similarly, plaintiffs' counsel admitted during oral argument that he has no basis to challenge the integrity of the Attorney General and Secretary of Homeland Security. The apparent good-faith of these officials, which is an inconvenient fact for the plaintiffs, leads inexorably to the unanswered question of why the district court essentially ignored or rejected their detailed national security advice to the President.

1018235, *17 (D. Md. 2017). As noted, national security is the most compelling of public interests, and the question of how best to protect public safety in this area does not, as the district court implies, boil down to a least-restrictive means test, *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005) ("We believe that the district court ultimately accorded insufficient deference to that determination, effectively imposing upon the President the equivalent of a least-restrictive-means test. To subject to such exacting scrutiny the President's determination that criminal prosecution would not adequately protect the Nation's security at a very minimum fails to accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress."), or require a danger that satisfies the court's "independent foreign policy analysis," *Regan v. Wald*, 468 U.S. 222, 242 (1984). Therefore, the relevant point is not whether the temporary travel pause is the *only* way, or even the best way, to protect national security. The simple fact of the matter is that regardless of any ulterior motive one might ascribe to the President, the record still conclusively establishes that the temporary travel pause will in fact promote an important national security objective.

Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest. As we have explained, for example, in applying the state secrets doctrine, a plaintiff with a plausibly viable constitutional claim can be barred from pursuing it "not through any fault of his own, but because his personal interest in pursuing his civil claim is sub-

ordinated to the collective interest in national security." *El-Masri*, 479 F.3d at 313. In my view, the very serious national security interest served by the temporary travel pause (as determined by those who are duly empowered to make the decision and who have access to current intelligence information) greatly outweighs the alleged temporary and relatively minor harm that will befall these few plaintiffs. The district court abused its discretion by failing to strike this balance. *See, e.g.*, *Sarsour v. Trump*, 2017 Westlaw 1113305, *15 (E.D.Va. 2017) ("Based on the record now before the Court, the parties' respective interests described above, the subject matter of EO-2, and the protections to the public that EO-2 is intended to provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.").

Today's decision may be celebrated by some as a victory for individual civil rights and justice, and by others as a political defeat for this President. Yet, it is shortsighted to ignore the larger ramifications of this decision. Regrettably, at the end of the day, the real losers in this case are the millions of individual Americans whose security is threatened on a daily basis by those who seek to do us harm. Even if the district court's instinct is correct and no tangible harm directly results from its order enjoining the President from attempting to protect American citizens, the injunction prohibits the government from addressing a serious risk identified by the Attorney General and Homeland Security Secretary; therefore, the security of our nation is indisputably lessened as a result of the injunction. Moreover, the President and his national security advi-

sors (and perhaps future Presidents) will be seriously hampered in their ability to exercise their constitutional duty to protect this country.[8]

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[8] At oral argument, several judges (including myself) questioned when, if ever, the President could free himself from the stigma of bias that the district court has enshrined by its *preliminary* "fact-finding." Notably, no one has provided a satisfactory response.

AGEE, Circuit Judge, with whom Judge NIEMEYER and Judge SHEDD join, dissenting:

In their haste to reach the merits of the plaintiffs' Establishment Clause claim, my colleagues in the majority neglect to follow the longstanding and well-defined requirements of Article III of the United States Constitution. They err, as did the district court, in holding that the plaintiffs had standing to bring an Establishment Clause claim. For that reason, I respectfully dissent from the majority's decision to uphold the district court's preliminary injunction. The plaintiffs do not have standing to bring the current action.[1]

I.

A.

Article III limits the federal judiciary's authority to adjudicate only "cases" and "controversies." U.S. Const. art. III, § 2. "[S]tanding is an integral component of the case or controversy requirement." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").[2] A plaintiff must satisfy three elements to establish standing: (1) "the plaintiff must have suffered an injury in fact

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[1] I join the well-written dissents of Judge Niemeyer and Judge Shedd in full. But, for the reasons stated herein, I would find it unnecessary to reach the merits of the plaintiffs' Establishment Clause claim.

[2] I have omitted internal alterations, citations, and quotation marks here and throughout this dissent, unless otherwise noted.

—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

Due to the difficulty of determining injury in Establishment Clause cases, "rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see also Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) ("Many of the harms that Establishment Clause plaintiffs suffer are spiritual and value-laden, rather than tangible and economic."). However, "a mere abstract objection to unconstitutional conduct is not sufficient to confer standing." *Suhre*, 131 F.3d at 1086; *see also Moss*, 683 F.3d at 605 ("Nonetheless, we must guard against efforts to use this principle to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury."). For example, "a citizen of Omaha, Nebraska who finds a

religious symbol in the Haywood County Courthouse [in North Carolina] to be offensive in the abstract would not have standing to challenge it. The injury to our hypothetical Omaha plaintiff partakes of a generalized grievance, based on nothing more than each citizen's shared individuated right to a government that shall make no law respecting the establishment of religion." *Suhre*, 131 F.3d at 1086; *accord Defenders of Wildlife*, 504 U.S. at 575 ("[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."). Conversely, "direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086.

B.

The district court determined that three of the individual plaintiffs (Meteab, John Doe #1, and John Doe #3) had sufficiently pleaded that they had suffered stigmatization due to the Executive Order. *See* J.A. 780 (finding that the plaintiffs claimed "the anti-Muslim animus underlying the Second Executive Order inflicts *stigmatizing injuries* on them all" (emphasis added)). Because Section 2(c) also allegedly prevents the family members of these plaintiffs from entering the country, the district court held that they had asserted injuries

sufficient to confer standing to pursue their Establishment Clause claim.

Doe #1 is a lawful permanent resident and "non-practicing Muslim[]." J.A. 213, 305. His wife, also a non-practicing Muslim and Iranian national, has applied for an immigrant visa. She is currently awaiting an embassy interview, a condition precedent to the determination of whether to grant a visa. *See* 22 C.F.R. § 42.62(b) ("Every alien executing an immigrant visa application must be interviewed by a consular officer who shall determine on the basis of the applicant's representations and the visa application and other relevant documentation—(1) The proper immigrant classification, if any, of the visa applicant, and (2) The applicant's eligibility to receive a visa."). Doe #1 alleges that the Executive Order has caused him and his wife to experience "significant fear, anxiety and insecurity . . . regarding their future." J.A. 246. He argues that because he is afraid that he will not be allowed to reenter the United States if he travels to Iran, Section 2(c) "forces [him] to choose between [his] career and being with [his] wife." J.A. 306. Doe #1 maintains that "the anti-Muslim views that are driving the Executive Order, as well as the Order itself, have caused [him] significant stress and anxiety." J.A. 306. He is allegedly concerned for his safety.

Like Doe #1, Doe #3 is a lawful permanent resident, although nothing in the record indicates his religious

preference.[3] In any event, Doe #3 applied for an immigrant visa on behalf of his wife, an Iranian national. In May 2016, the United States Embassy "informed [her] that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join her husband in two to three months." J.A. 246. With his wife in Iran, Doe #3 maintains that "[t]heir continued separation has placed extraordinary stress on John Doe #3 and his wife, and their relationship." J.A. 247. He "feel[s] as though they've been unable to start their lives together because of the delays and uncertainty caused by the Executive Order." J.A. 247. Doe #3 asserts that he and his wife "are being torn apart by this situation and the uncertainty and delay." J.A. 310. He believes that the anti-Muslim message of the Executive Order has caused him stress and anxiety and to feel like an outsider.

Meteab is also a lawful permanent resident and Muslim. His wife and children are here in the United States. However, Meteab has three brothers who wish to resettle in North America as refugees. Two of the three have received approval for resettlement in the United States but have not yet obtained travel documents. The remaining brother has been approved for resettlement in Canada. Meteab contends that, as a result of the Executive Order, he "and his wife have

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[3] The pleadings make only one religious reference with respect to Doe #3: "The anti-Muslim attitudes that are driving this Executive Order have caused me stress and anxiety and made me question whether I even belong in this country despite everything I have sacrificed and invested in making a life here." J.A. 310.

experienced anti-Muslim sentiment and felt very uncomfortable and insecure in their community, causing them acute mental stress." J.A. 250. The couple "ha[s] experienced hostility in public, with people staring at Mr. Meteab's wife, who wears a hijab, and refusing to stop for them at crosswalks." J.A. 250.

C.

The district court held that, "where the [allegedly anti-Muslim] Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a personal injury as a consequence of the alleged Establishment Clause violation." J.A. 787. However, as the record reflects, the district court clearly erred in finding that Meteab had standing to challenge Section 2(c) of the Executive Order. Meteab's brothers are refugees, and Section 2(c) does not apply to refugees. The district court recognized in its opinion that "[t]he Plaintiffs' Establishment Clause . . . arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order." J.A. 809. The court elaborated that the plaintiffs had "not sufficiently develop[ed] . . . argument[s relating to refugees] to warrant an injunction on those sections at this time." J.A. 810. Therefore, Meteab cannot base standing to challenge Section 2(c) on any "prolonged separation" from his refugee brothers, who are covered by a different section of the Executive Order. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352

(2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___, 134 S. Ct. 1377 (2014). Thus, Meteab can show Establishment Clause standing only if his alleged stigmatization is a cognizable injury for standing purposes.

As for Doe #3, his wife was granted a visa during the pendency of this appeal, so he, too, is left with only stigma to make his Establishment Clause claim of standing. For the reasons stated below, such a stigma claim alone is insufficient to confer standing under the record in this case.

Perhaps recognizing these deficits, the majority bases its affirmation of the district court's standing determination only on Doe #1. But Doe #1 does not have standing either because the stigma that he alleges to have suffered and the potential denial of a visa to his wife are two distinct harms, neither of which meet basic standing requirements. Setting aside Doe #1's allegation that he experienced stigmatization himself, the imagined future denial of a visa to his wife is simply too vague and speculative to meet the constitutional standard of a concrete and "actual or imminent, not conjectural or hypothetical" injury. *Defenders of Wildlife*, 504 U.S. at 560. The majority's conception of "injury-in-fact" by Doe #1 is conjectural and hypothetical; he

had no reasonable expectation that his wife would join him in the United States at any particular time either prior to the drafting of the Executive Order or at any time during the suspension period.

1.

The plaintiffs' pleadings show that their alleged injuries consist solely of their personal perception of stigmatization. In the complaint, they allege, "The March 6 Order also contains language that associates Muslims with violence, terrorism, bigotry, and hatred, inflicting *stigmatic and dignitary harms*." J.A. 207 (emphasis added). Despite the majority's holding, the stigma that plaintiffs claim to have suffered is not a cognizable injury because it is simply a subjective disagreement with a government action. To allow these plaintiffs to pursue their claims based on an idiosyncratic projection of stigmatization is to grant every would-be Establishment Clause plaintiff who develops negative feelings in response to some action by the Government a court proceeding in which to vent his subjective reactions as a legal claim. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause."). Indeed, to find standing here is to find standing for not only all Muslims in America, but *any* American who may find the Executive Order (or any other Government action) personally disagreeable, which is "beyond all reason." *See Defenders of Wildlife*, 504 U.S. at 566.

The Supreme Court "ha[s] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.* at 573-74; *accord Valley Forge*, 454 U.S. at 482-83 (stating that the Supreme Court "repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law"). The Court has rejected a generalized finding of standing based on "the need for an available plaintiff, without whom the Establishment Clause would be rendered virtually unenforceable by the judiciary." *Valley Forge*, 454 U.S. at 470. The plaintiffs here "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The majority does not provide any principled instruction on how its sweeping standing ruling is cabined to this particular case, and thus its holding far oversteps the bounds of traditional judicial authority. *See id.* at 471 (stating that Article III is a limitation on "judicial power"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."), *abrogated on other grounds by Lexmark*, 134 S. Ct. 1377; *Defenders of Wildlife*, 504 U.S. at 576

("Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.").

The majority relies heavily on two Fourth Circuit cases, *Suhre* and *Moss*, but these cases are inapposite.[4] In *Suhre*, local officials displayed the Ten Commandments in the county courthouse where the plaintiff, a resident of the county, often visited. 131 F.3d at 1084-85. Suhre, an avowed atheist and serial litigant, took offense to the display and "aver[red] that contact with the display cause[d] him distress." *Id.* at 1085. We ultimately found that Suhre had alleged a "cognizable injury caused by personal contact with a public religious display." *Id.* at 1090.

In *Moss*, a school district "adopted a policy allowing public school students to receive two academic credits for off-campus religious instruction offered by private educators." 683 F.3d at 601. The plaintiffs, including two students and their parents, urged the Court to "adopt a per se rule that students and parents always have standing to bring suit against policies at their school when they allege a violation of the Establishment Clause, regardless of whether they allege or can prove personal injury." *Id.* at 605. We rejected that argument and held that, although injuries in such cases are often intangible, plaintiffs must have been "spiritu-

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[4] *Suhre* is a religious display case, a type of Establishment Clause claim that arguably belongs in its own category. *See* 131 F.3d at 1086 ("Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence.").

ally affronted as a result of direct and unwelcome contact with an alleged religious establishment within their community." *Id.* Because one student had no "personal exposure" to the policy other than mere awareness of its existence, we held that the student lacked standing, despite that student "feel[ing] like an outsider" in the school environment. *Id.* at 606. However, we found that the other student had standing to bring a claim because she actually received a solicitation letter from a religious institution that participated in the school's program and "changed [her] conduct in adverse ways as a result of [her] perceived outsider status." *Id.* at 607.

In both of these cases, local governments took direct actions in relation to their constituents in an immediate and concrete way. All residents who entered the courthouse in *Suhre* were personally exposed to the display of the Ten Commandments, while the academic policy in *Moss* was actually sent to the student. As a consequence, the plaintiffs in those cases did come into direct contact with the alleged Establishment Clause violations.[5]

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[5] The out-of-circuit cases on which the majority also relies are likewise inapposite for the same reasons that distinguish *Suhre* and *Moss*. *See Awad v. Ziriax*, 670 F.3d 1111, 1116, 1122 (10th Cir. 2012) (analyzing a "proposed constitutional amendment that would prevent Oklahoma state courts from considering or using Sharia law"); *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 624 F.3d 1043, 1048-53 (9th Cir. 2010) (reviewing standing in a case challenging a city resolution that ordered Catholics in San Francisco to cease discriminating against same-sex couples).

In contrast, the Executive Order here applies only to prospective immigrants. The order's focus faces outward towards the alien residents of the subject countries, not inward towards persons in the United States like the plaintiffs. That circumstance is in direct distinction to the religious display in *Suhre* or the academic policy in *Moss*. Section 2(c) of the facially-neutral Executive Order applies only to "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." Section 3(b)(i) explicitly exempts "any lawful permanent resident of the United States," like the plaintiffs, from the travel suspension, thus not applying to Does #1 and #3 and Meteab. The majority posits that, because the policy at issue came from the President himself that somehow metamorphosizes into the "direct contact" *Suhre* requires. Majority Op. 39. This distorts the standing inquiry as the source of the directive is irrelevant. What matters is whether the plaintiff came into direct contact with the religious establishment. And that is not the case here simply because the President is the party signing an order.

Despite the majority's giving short shrift to *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), the case is directly on point. There, "[a] group of Protestant Navy chaplains sued the Navy, alleging that the Navy's operation of its retirement system discriminates in favor of Catholic chaplains in violation of the Establishment Clause." *Id.* at 758.[6] The plaintiffs "conceded that the Navy did not deny them any bene-

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[6] It is irrelevant that *In re Navy Chaplaincy* is a favoritism case as opposed to a condemnation case as alleged here, as they are two sides of the same Establishment Clause coin.

fits or opportunities on account of their religion." *Id.* at 760. Rather, they maintained "that *other* chaplains suffered such discrimination." *Id.* The plaintiffs contended that they had standing because "they ha[d] been subjected to the Navy's message of religious preference as a result of the Navy's running a retirement system that favors Catholic chaplains." *Id.* The D.C. Circuit rejected this argument and found that they did not "have standing based on their exposure to the Navy's alleged message of religious preference." *Id.* at 761. Like the Protestant Navy chaplains, the plaintiffs here claim offense to a message directed at others, who happen to be nationals of other countries. The plaintiffs' claims of stress or stigmatization are subjective reactions, not direct contact with the Executive Order, and amount to disagreements with a government policy. *See Moss*, 683 F.3d at 604-05. As a result, the plaintiffs' claim of injury by way of stigma is a general grievance, insufficient to confer standing. *Suhre*, 131 F.3d at 1086.[7]

2.

Perhaps recognizing the problems posed by basing standing only on the subjective feelings of the plaintiffs, the majority also holds that the alleged stigma

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[7] Some of the plaintiffs, including Doe #1, have expressed fear that they will be denied reentry into the country if they travel to the subject countries to visit their family while the Executive Order is in effect. This fear is unfounded and contradicted by the plain terms of the Executive Order. Does #1 and 3 and Meteab are all lawful permanent residents. Section 3(b)(i) of the Executive Order exempts "any lawful permanent resident of the United States" from the temporary suspension of entry.

suffered by Doe #1, combined with prolonged separation from his wife, is enough to support standing, thereby creating a kind of "stigma plus" standard.[8] However, the majority's construct erroneously conflates Doe #1's Establishment Clause standing claim with his claim under the Immigration and Nationality Act ("INA"), which the Supreme Court has prohibited. *See DaimlerChrysler Corp.*, 547 U.S. at 352 ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). Plaintiffs are required to "demonstrate standing *separately* for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added). The majority haphazardly merges alleged injuries unique to two different claims, and personal to different people, to manufacture standing.[9]

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[8] In its attempt to distinguish *In re Navy Chaplaincy*, the majority implicitly holds that stigma alone is not enough to support standing. The majority states that, "contrary to the Government's assertion, all Muslims in the United States do not have standing to bring this suit. Only those persons who suffer direct, cognizable injuries as a result of EO-2 have standing to challenge it." Majority Op. 40 n.11. The majority avers that Doe #1 "is feeling the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." *Id.* at 40. The majority is right in that regard—stigma is not enough.

[9] Although not the focus of this dissent, I also would find that Doe #1 does not have standing to bring an INA claim; he lacks a concrete injury. It is pure speculation whether Doe #1's wife will receive a visa. Doe #1 has presented no evidence showing that his wife is likely to receive a visa, much less when, but for the operation of the executive order. Or that the executive order would

The majority reasons that Doe #1 has third-party standing to bring an Establishment Clause claim. Not so. Plaintiffs do not have standing to allege violations of the Establishment Clause on behalf of their immigrant relatives. *See Whitmore v. Arkansas*, 495 U.S. 149, 161 n.2 (1990) (restating the general rule "that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *cf. Defenders of Wildlife*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."). The rela-

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tangibly affect the processing of her application in any way. *See* Opening Br. 19-20 ("Likewise, Doe #1's wife did not have her visa interview scheduled before the Revoked Order took effect, and had already been waiting roughly six weeks, making it similarly speculative whether the 90-day pause will affect her."); *see also The Immigrant Visa Process: Interview*, U.S. Dep't of State, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview.html (last visited May 23, 2017) (saved as ECF opinion attachment) (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available" (emphasis added)). Nor has the Government denied the visa application of Doe #1's spouse.

Any injury caused by the Executive Order is not redressable because an injunction will not establish that Doe #1's wife will receive a visa, as exemplified by her current status. *See The Immigrant Visa Process: Interview*, *supra* ("Based on U.S. law, not everyone who applies for a visa will be found eligible to come to the United States."). Doe #1 does not have standing under the INA.

tives, in turn, do not have rights of entry or any Establishment Clause rights. *Kerry v. Din*, 576 U.S. __, 135 S. Ct. 2128, 2131 (2015) ("But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that "the people protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). Doe #1 is "seeking to vindicate, not [his] own rights, but the rights of others." *Moss*, 683 F.3d at 606.

Doe #1 has no right to, or even a reasonable expectation of, a time certain meeting with his wife in America. His alleged injury is based on a mere conjecture that his wife will have her embassy interview and obtain a discretionary visa within the ninety-day suspension period of the Executive Order when the State Department has cautioned, well before the Executive Order, that it may take an indefinite period to schedule interviews much less adjudicate visa applications. *See The Immigrant Visa Process: Interview*, *supra* note 9 (stating that, although "[m]ost appointments are set within 60 days of [the National Visa Center's] receipt of all requested documentation[,] . . . we *cannot predict when an interview appointment will be available*," and warning that "[t]here may be a wait of *several months* for an interview date to become available"

(emphasis added)). Any effect of the Executive Order on that speculative possibility is simply not determinable and thus fails to meet the constitutional standard of an injury "actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560.

The majority underscores the fragility of its standing hypotheses when it avers, without any citation to precedent or evidence, that the Executive Order creates harm to the plaintiffs because "dedicating time and resources to a global review process[, for which Section 2(c) was designed to facilitate,] will further slow the adjudication of pending [visa] applications." Majority Op. 36. Nothing in the record supports this assertion or ties any nexus to Doe #1 or his spouse. Doe #1 simply fails to carry his burden as to standing under the standard required by the Supreme Court. No constitutionally cognizable "harm" which is "certainly impending" to Doe #1 or to him via his spouse has been proffered. *Defenders of Wildlife*, 504 U.S. at 564 n.2.[10]

For all these reasons, Doe #1 has no "legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560,

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[10] Similarly, there is no feasible way to determine, except by pure speculation, how or whether the Executive Order's visa waiver process might affect a particular visa application. Nothing in the record supports the majority's conclusion that pursuing a waiver would affect any plaintiff. Rather, the majority has arbitrarily substituted its conjecture for evidence. The visa waiver process could just as likely allow Doe #1's wife to obtain her visa as not during the temporary suspension period.

and no standing to pursue his Establishment Clause claim.[11]

II.

As the plaintiffs lack standing to pursue their cause of action, I respectfully dissent and would vacate the grant of a preliminary injunction by the district court.

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[11] The district court did not determine whether other individual plaintiffs or the organizational plaintiffs have standing to bring the Establishment Clause claim. That would be a matter to be considered by the district court in the first instance in any further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

SECOND DECLARATION OF REBECCA HELLER, DIRECTOR OF IRAP, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

SECOND DECLARATION OF REBECCA HELLER

I, Rebecca Heller, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. §1746 and declare as follows:

1. I am the Director and co-founder of the International Refugee Assistance Project ("IRAP"), a project of the Urban Justice Center, Inc., a Plaintiff in the above-captioned case. I have been with IRAP since August 2008.

2. As IRAP's Director, I oversee all of IRAP's operations and activities, including programming and development. I am in constant, regular communication with my staff who provide legal representation to vulnerable individuals and consult with pro bono attorneys and law students working on IRAP cases. I also

represent a number of refugee and visa cases myself, consult with numerous attorneys working on related cases, monitor field conditions on the ground in the Middle East/North Africa Region, liaise with the U.S. government and the United Nations around refugee and visa processing issues, and coordinate partnerships with numerous NGOs working with and advocating for refugees and immigrants in the U.S. and abroad. Throughout my eight and a half years working on Middle East refugee issues, I have overseen, consulted on and/or represented thousands of cases.

3. I also teach a seminar on refugee law and practice at Yale Law School.

4. Founded in 2008, IRAP's mission is to provide and facilitate free legal services for vulnerable populations around the world, including refugees, who seek to escape persecution and find safety in the United States and other Western countries. IRAP has a staff of over 25 individuals based in offices in New York, Lebanon, and Jordan. IRAP works with 29 law school chapters and over 75 firms to provide pro bono assistance to persecuted individauls around the world. IRAP relies on the volunteer and pro bono assistance to meet the needs of its client base.

5. IRAP lawyers provide legal assistance to refugees and other immigrants to the United States throughout the resettlement process. IRAP also assists many individuals (including refugees, asylees, Lawful Permanent Residents and U.S. Citizens) inside the United States who need assistance filing family reunification petitions for family members overseas. IRAP has

provided legal counseling and assistance to nearly 20,000 individuals.

6. Since its inception, IRAP has helped to resettle over 3,200 individuals from 55 countries of origin, with the majority resettled to the United States.

7. IRAP's client base includes refugees from Iraq, Afghanistan, Egypt, Eritrea, Ethiopia, Iran, Jordan, Kuwait, Libya, Pakistan, Palestine, Somalia, Sudan, Syria, Turkey, and Yemen. Of IRAP's current 599 open cases, 402 families are from one of the six countries targeted in the new Executive Order or are refugees from other countries and therefore potentially affected by the Executive Order. The overwhelming majority of IRAP's clients, including clients abroad and those within the United States, identify as Muslim.

8. Implementation of the Executive Order has frustrated and will continue to frustrate IRAP's mission and imposes a significant burden on its work. By drastically reducing the number of resettlement slots available for this fiscal year and freezing the resettlement process for at least 120 days, the Executive Order will force IRAP to invest significant time and energy exploring alternative routes to safety for its clients (many of whom are in imminent and life-threatening danger) and educating its network of over 2,000 pro bono attorneys and law students about those alternate routes. IRAP attorneys must also counsel their own clients about the changes in law as well as pursue other resettlement options for them, even though many were already being processed in the U.S. Refugee Admissions Program ("USRAP"). The first Executive Order has already wasted significant resources (typically hun-

dreds of hours of legal representation over the course of many years navigating USRAP), forcing IRAP and our clients to make the Hobson's choice between starting the process over with another country, attempting to shelter in place in spite of life-threatening circumstances, or undertaking dangerous journeys to reach safety across other borders. Because the new Executive Order mirrors the first in terms of its effect on IRAP's refugee and immigrant clients, it too places IRAP and its clients at imminent risk of irreparable harm.[1]

9. Following the signing of the first Executive Order, on January 27, 2017 at 4:42 P.M. EST, two IRAP clients, Mr. Hameed Khalid Darweesh and Mr. Haider Sameer Abdulkhaleq Alshawi, were detained at John F. Kennedy Airport ("JFK") despite having valid entry documents. As a result, IRAP attorneys were present at JFK from 2 am to 6:30 pm on January 28, 2017 attempting to secure their lawful release. Furthermore, together with cocounsel, IRAP filed a habeas petition on behalf of those two clients, together with a motion for class certification (*Darweesh et al. v. Trump et al.*, No. 1:17-cv-480 (E.D.N.Y. filed Jan. 28, 2017)). That litigation is ongoing. These actions are not in the scope of normal IRAP legal assistance, as previous IRAP

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[1] Since I do not anticipate any material difference in the effect of the new Executive Order Section 6(b)'s reduction by more than half of the refugee resettlement allotment for fiscal year 2017, which follows verbatim the first Executive Order's Section 5(d), I incorporate by reference my declaration submitted in support of Plaintiffs' Motion for a Preliminary Injunction Against Section 5(d). *See* Declaration of Rebecca Heller, Dkt. No. 64-1 (J.R. 26-35).

clients were allowed to enter at U.S. Ports of Entry after receiving final approval to travel.

10. Both the first and the new Executive Order have also diverted IRAP resources as IRAP has become the focal point organization for volunteer attorneys all across the country who have gone to airports to attempt to secure the release of individuals detained pursuant to the first Executive Order. In addition to being the first organization to put out a call to volunteer attorneys, IRAP created and maintains a unique hotline email address (airport@refugeerights.org) to advise attorneys and affected individuals. Since the creation of this email address on January 28, 2017, IRAP has received and responded to nearly 800 email messages. IRAP has also developed templates and informational materials for attorneys, affected family members in the United States, and individuals overseas who have been denied travel pursuant to the Order. These actions are not in the normal scope of IRAP's work. I anticipate that this work will continue for IRAP under the new Executive Order as the need will continue to exist.

11. As a result of this Executive Order, our attorneys anticipate that their current caseload will take much longer to be resolved which has resulted in their limited capacity to take on the full representation of new clients. Thus, they now are providing limited representation in certain new cases, which prior to the Executive Order would have received full representation, given the likely exorbitant delays in USRAP processing. This both diverts resources and frustrates our core mission.

12. Furthermore, because of the drastic decrease in refugee admissions and freeze in refugee processing, IRAP has significantly limited ability to open new law school chapters or begin new relationships with law firms to place cases for direct representation. We also are unable to place new cases with existing chapters or law firms because there is no movement on any refugee cases. We risk losing hundreds of volunteers, and relationships with numerous law firms, because we are unable to provide them with a way to partner with us on cases.

13. Our law firm partners also provide financial support with us. If we no longer have cases to place at law firms, and thus have to decrease our number of law firm partners, it will significantly cut into the corporate funding we receive.

14. In 2016, IRAP had been designated as a Priority 1 non-governmental organization (NGO) with the ability to make referrals of vulnerable refugees to USRAP. This authorization will now not be of any benfit to our clients if the USRAP is frozen or individuals from particular countries are ineligible.

15. As less than 1% of refugees are referred to countries for resettlement by the United Nations High Commissioner for Refugees (UNHCR), IRAP has significantly limited ability to draft referrals for our clients currently in USRAP to be sent to other safe countries because of the limited resettlement slots worldwide.

16. As a result of the Executive Order, IRAP's Resettlement Deployment Scheme with UNHCR, which allows IRAP resettlement experts since early 2016 to

be deployed to UNHCR for assisting with their resettlement operations, may be terminated due to the drastic decrease in resettlement slots available in the US and worldwide. This would lead to the termination of three IRAP staff as well as a revenue loss of approximately $260,000.

17. IRAP provides safe housing for clients whose lives are in immediate danger while they await the outcomes of USRAP. Clients in urgent situations who face additional four-month delays on their applications (at a minimum) will require significant funding expenditures to ensure continued safe housing.

18. The new Executive Order will continue the significant backlog in the USRAP that resulted from the first Executive Order, delaying the processing of many of IRAP's clients' cases. This delay will force IRAP to exhaust more of its resources, as the average lifespan of a case now grows significantly. IRAP has a legal department composed of staff attorneys who advise and provide consultation to its network of pro bono legal volunteers on their casework. Because of delays in processing, IRAP's attorneys must spend significantly more time on each case, providing guidance about alternative routes to safety and possible exemptions. In addition to IRAP's staff attorneys' existing and ongoing responsibilities, they must now also draft and review additional submissions to State and to the Department of Homeland Security ("DHS"), such as waiver requests for admission to the United States for their clients, which will be reviewed by a case-by-case basis under the new Executive Order. Further, IRAP's field staff must largely give up their work on refugee

case processing and focus primarily on ensuring the local safety of refugees who thought their lives would be saved for resettlement, and who are now caught in life-threatening limbo.

19. The Executive Order puts IRAP's refugee and immigrant clients in grave danger, because the longer it takes for their cases to be decided, the longer they are in life-threatening environments. All of IRAP's clients are in limbo and irreparably harmed because their cases have been indefinitely stalled. Many are at imminent risk of persecution and death where they currently reside, and many others now face indefinite separation from family members already in the United States.

20. Many of IRAP's clients have been referred to the US for resettlement by the UN refugee agency, the United Nations High Commissioner for Refugees ("UNHCR"). UNHCR only refers the most vulnerable refugees for resettlement, such as unaccompanied minors, women-at-risk, and individuals with urgent medical or protection concerns. Less than 1% of refugees worldwide are referred for resettlement by UNHCR. If UNHCR refers an individual to USRAP, they are likely extremely vulnerable and have strong, prevetted refugee claims. Further, once UNHCR refers a refugee to USRAP, it precludes them from referring the refugee to another country until the USRAP process is completed.

21. IRAP works with some of the most vulnerable individuals in the world, including U.S.-affiliated refugees, LGBTI refugees, women who have survived trafficking, sexual and gender-based violence, and children

with emergency medical needs. We estimate that approximately 700 IRAP clients are now trapped in the limbo of a halted U.S. Refugee Admissions Program as a result of the first Executive Order. The cases will continue in their freezed state under the new Executive Order and their prospects of coming to the U.S. any time soon have evaporated.

22. Furthermore, while the revised Executive Order takes off Iraq from the list of barred countries, Iraqis are still part of the suspension of USRAP processing. Over 50,000 U.S.-affiliated Iraqis are negatively impacted by this new Executive Order, including interpreters for the U.S. Army and for U.S. media organizations, NGO workers, fixers, engineers, and physicians. These are Iraqis who supported the U.S. mission in Iraq and are now being targeted by militias and terrorist groups as a result.

23. Although the revised Executive Order allows for waivers in certain cases, these waivers will not be available to the vast majority of our clients. DHS interviews are currently only taking place in Vienna and Nauru. Based on my understanding of the refugee process and the language of the Executive Order, waivers will not be available for refugees who have not had DHS interviews. Therefore, hundreds of our clients (and thousands of refugees in the USRAP pipeline) throughout the Middle East and North Africa region (not to mention anyone who is not in Vienna or Naru) will be ineligible for a waiver regardless of circumstances.

24. While we have been told by some government officials that a waiver process will exist, we have yet to

receive any details about how to refer cases, how long waivers will take, or how many waivers are available. We have been told that waivers will only be considered on an individual basis and the Executive Order requires the designation of new personnel to review the waivers.

25. It is also my understanding based on my knowledge of refugee processing that at the end of the 120-day period, even if the refugee program reopens, under the terms of the Executive Order there will be a new security process that most of our clients must go through. In the past, security clearances typically take anywhere from one to five years. Thus, even *if* the refugee process goes back online following the Executive Order, under the terms of the order our clients are likely to be delayed for several additional years (even those already post-approval).

26. Both the first Executive Order and the new Executive Order that will replace it marginalize IRAP's Muslim clients and subject them to suspicion, scrutiny, and social isolation on account of their religious beliefs and national origin. Clients who are already inside the U.S. are afraid and fear they are not welcome. Some have been subjected to harassment by law enforcement agencies allegedly conducting "new" security checks. Others have been detained at airports, or rejected from flights multiple times even though they are presenting valid visas. Our clients in USRAP and our Special Immigrant Visa programs are seeking resettlement ot the U.S. as a safe haven but now feel threatened by the only safe option available to them.

27. Many of IRAP's clients, including those living in the United States are fearful of asserting their legal

rights through participation in lawsuits or otherwise. In addition to fears around possible retaliation from the government or private parties given the current anti-refugee and anti-Muslim climate in the United States, they face multiple barriers to doing so, including language barriers and unfamiliarity with American law and customs, including many customs we take for granted. For example, many of our clients have difficulty completing forms that seem basic and simple to Americans; a form that has a line for "address line two," for example, confuses our clients, who do not understand why the form is asking for a second address. Moreover, a significant number of our clients have suffered extreme trauma, often at the hands of government officials; this trauma has predictable and understandable consequences, often including a desire to avoid calling attention to themselves, particularly from government officials, both in the United States and in their home countries. Many also feel shame or stigma associated with what has happened to them in their home countries, and avoid situations where they may have to talk about it, such as through participation in a lawsuit.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at in Los Angeles, California, on March 10, 2017.

/s/ REBECCA HELLER
REBECCA HELLER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC., IN SUPPORT OF PLAINTIFFS' MOTION FOR TERMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION OF THE SECOND EXECUTIVE ORDER

DECLARATION OF MARK HETFIELD, PRESIDENT AND CEO OF HIAS, INC.

I, Mark Hetfield, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the President and Chief Executive Officer of HIAS, Inc., a Plaintiff in the above-captioned case.

2. HIAS was founded in 1881 as the Hebrew Immigrant Aid Society to assist Jews fleeing pogroms in Russia and Eastern Europe. It is the world's oldest —and only Jewish—refugee resettlement agency. Today, HIAS serves refugees and persecuted people of all faiths and nationalities around the globe. Since HIAS's founding, the organization has helped more

than 4.5 million refugees start new lives. In 2016 alone, HIAS provided services to more than 350,000 refugees and asylum seekers globally.

3. HIAS has offices in twelve countries worldwide, including its headquarters in Silver Spring, Maryland, its principal place of business, and additional domestic offices in New York City and Washington, D.C.

4. HIAS's refugee resettlement work is grounded in, and an expression of, the organization's sincere Jewish beliefs. The Torah, Judaism's central and most holy text, commands followers to welcome, love, and protect the stranger. The Jewish obligation to the stranger is repeated in various ways throughout the Torah, more than any other teaching or commandment. HIAS believes that this religious commandment demands concern for and protection of persecuted people of all faiths. The Torah also teaches that the Jewish people are to welcome, protect, and love the stranger because "we were strangers in the land of Egypt" (Leviticus 19:34). Throughout their history, violence and persecution have made the Jewish people a refugee people. Thus, both our history and our values lead HIAS to welcome all refugees in need of protection. A refusal to aid persecuted people of any one faith, because of stigma attached to that faith, violates HIAS's deeply held religious convictions.

5. HIAS's client base includes refugees and their families abroad and those located in the United States. Hundreds of these clients hail from the six countries singled out in Section 2(c) of the March 6 Executive Order, including Syria, Iran, Sudan, Somalia, and Yemen. Other clients, who will also be affected by the

120-day ban on refugees in Section 6(a) of the Order, hail from countries that include Iraq, Ukraine, Bhutan, the Democratic Republic of the Congo, Afghanistan, Eritrea, Tanzania, Ethiopia, Central African Republic, Burundi, South Sudan, Uganda, Russia, Belarus, Burma, and El Salvador. Its overseas clients are seeking refugee status, and do so precisely because they face a real risk of persecution at home. They remain in precarious situations often in third countries. HIAS also provides services to individuals entering the United States under the Special Immigrant Visa ("SIV") program available to persons who worked with the U.S. Armed Forces as a translator or interpreter in Iraq or Afghanistan.

6. HIAS is one of nine non-profit organizations, called "Resettlement Agencies," designated by the federal government to undertake this humanitarian work through cooperative agreements with the U.S. Department of State and the U.S. Department of Health and Human Services. To serve these refugees, HIAS currently holds sub-agreements with 18 local organizations ("affiliates") who operate and oversee 21 resettlement sites across the country. A resettlement site is an office of one of the Resettlement Agencies; it could be either an affiliate or a sub-office of an affiliate. There may be more than one resettlement site in a single city, depending on how many national agencies have offices there. HIAS itself also directly operates a resettlement site in New York City, and, before the Executive Order was signed, was on the verge of expanding to an additional resettlement site in West-

chester County, New York, which had been approved by the Department of State.

7. HIAS is assigned clients via the Department of State's allocation process, which determines which refugee clients will be resettled by HIAS. Other clients —already residing in the United States—connect with HIAS when they come to one of HIAS's local affiliates to file paperwork to initiate requests for refugee status for their relatives abroad.

8. HIAS's work with the federal government occurs pursuant to several different cooperative agreements, including a cooperative agreement with the Department of State that provides funding for the Reception and Placement program. In Federal Fiscal Year ("FFY") 2017, HIAS's approved budget through this agreement was $11.4 million, including funding for headquarters, affiliates, and direct assistance to refugees. Through headquarters staff, HIAS interfaces with the Department of State's contractor for refugee processing, places cases with local affiliates, monitors the refugees' travel to the United States and their final destination in the United States, monitors affiliates for ongoing compliance, and works with the affiliates to ensure effective and timely service delivery to the new arrivals. The total budget under the cooperative agreement is approved at the beginning of the fiscal year, although the Department of State allocates the funds in portions throughout the year, depending on the amount of funding approved by Congress.

9. The largest source of funding for refugee resettlement by HIAS and its affiliates is the funding for Reception and Placement services for new refugee

arrivals. These funds are provided by the government on a per capita basis, currently at the rate of $2,075 per refugee. That amount includes $1,125 of direct assistance per refugee and $950 for affiliate staff support per refugee. The funding provided by the Department of State through the Reception and Placement program is intended to cover expenses for the refugees' initial period of resettlement, up to three months after arrival. With this funding, HIAS and its affiliates must find housing for the refugees, provide them with money for rent and utilities for up to three months, and supply them with initial food and medical care before government-funded benefits begin. In addition, with this funding, the affiliates pay for case management services for the refugees, which include meeting the refugees at the airport and bringing them to their new homes, providing initial safety orientation followed by weeks of extensive cultural orientation to adjust them to life in America, and assisting them in enrolling in ESL classes, school, employment services, and benefits programs (including Medicare, food stamps and Supplemental Security Income for the elderly and disabled).

10. In FFY 2016, HIAS's cooperative agreement with the Department of State provided that HIAS and its affiliates would resettle 3,768 refugees and SIVs in the United States. However, as the number of refugees and SIV's approved for admission increased, HIAS eventually resettled 4,191 individuals that year. The Department of State, aware that it would significantly increase capacity for refugees in FFY 2017, then requested that HIAS apply for higher numbers of

arrivals as the refugee program expanded. As a result, in its cooperative agreement for FFY 2017, HIAS was engaged to resettle 4,794 refugees and SIVs.

11. The Presidential Determination on Refugee Admissions for Fiscal Year 2017, signed in September 2016, authorized the admission of up to 110,000 refugees. Under the March 6 Executive Order, however, that number will be drastically reduced by the 90-day and 120-day bans in Sections 2(c) and 6(a), respectively, and Section 6(b)'s extreme reduction in refugee admissions overall to 50,000. As a result, HIAS and its affiliates will not be able to resettle a significant portion of planned-for arrivals. Indeed, in February, the Department of State notified HIAS that, because of the reduction in refugee admission levels in Section 5(d) of the January 27 Executive Order, HIAS's resettlement obligation for FFY 2017 would be reduced by 39 percent to 2,912 refugees and SIVs. Attached hereto as Exhibits 1 and 2 are true and correct copies of two email communications sent to HIAS staff by the Department of State, dated February 16, 2017, and February 17, 2017, respectively, outlining the changes mandated as a result of Section 5(d) of the January 27 Executive Order. That reduction in the level of refugee admissions remains in Section 6(b) the Revised Executive Order, and thus HIAS will still experience a 39 percent reduction in planned refugee resettlement, and a reduction in funding for its program.

12. Because HIAS had already resettled 1,941 refugees and SIVs for this fiscal year by the end of February, it will be permitted to resettle only 971 additional refugees and SIVs for the remainder of the year.

The financial losses to HIAS and its affiliate network —up to $2.2 million—will be crippling, especially for many of HIAS's affiliates, which are heavily dependent on funding that flows through HIAS. And, those losses will be hastened by the 120-day ban on refugee admissions. On March 6, 2017, the Department of State informed HIAS that only refugees who are already booked for travel to the United States arriving at their port of entry through the end of March 15, 2017, i.e., before the March 6 Order's effective date of March 16, 2017 at 12:01 am, will be permitted to enter the United States. Defendant Department of State has indicated that no further bookings may be made. Attached hereto as Exhibit 3 is a true and correct copy of the pertinent email communication sent to HIAS staff by the Department of State, dated March 6, 2017. The email also informed HIAS that all DHS screening interviews will continue to be suspended until further notice, unless exceptions are arranged on an individual basis and that no new Interagency Checks (IAC) and Security Advisory Opinion (SAC) security checks may be requested.

13. The risk that the Executive Order poses to the viability of HIAS, its affiliates, and the vital services they provide to refugees is very real. World Relief, one of the other nine resettlement agencies that partners with the government, has already announced that it will be forced to lay off 140 staff members and close five of its offices due to the Executive Order. The Executive Order will likewise significantly impede HIAS's work for the government and the services provided to refugees, causing irreparable harm to

HIAS, its affiliates, and its clients. HIAS itself has already been precluded from refilling key positions. HIAS has been compelled by President Trump's two immigration executive orders to dedicate substantial resources to finding other sources of support for its work, and will likely find itself in the same position as World Relief vis-à-vis layoffs if the Executive Order is allowed to be implemented. These staff losses negatively impact the services that HIAS is able to provide to refugees.

14. Affiliates, who hold sub-agreements under HIAS, operate and oversee a number of resettlement sites and are an integral part of the resettlement process; indeed, without them, it would be nearly impossible to ensure that refugees are properly resettled and integrated into communities. However, as a result of the financial losses stemming from the 90-day and 120-day bans and the reduction in admission of refugees to 50,000, some of HIAS's affiliates may be forced to shut down permanently or significantly pare back their resettlement programs and sites. Affiliates have already laid off staff in response to the Executive Order. For example, HIAS's affiliate in Ohio—US Together—has already laid off more than six employees at just one resettlement site. Many of the staff who have lost their jobs or are likely to be laid off are staff who work directly with refugee clients, and are often former refugees themselves. HIAS also operates a direct resettlement site out of its New York office. If the Executive Order remains in place, it is likely that reductions in funding will require HIAS to lay off employees at its New York site.

15. When sites are shuttered or their capacity significantly decreased through staff layoffs and cut resources, the local expertise and relationships—developed by affiliate staff, often over years and years—is lost entirely or substantially diminished. Building a new resettlement site can take months or years of relationship-building, including cooperation with local government and elected officials, businesses who would be potential employers, landlords, and the refugee communities themselves.

16. In particular, in establishing and operating these sites, affiliates depend heavily on volunteer networks and support within interfaith religious communities to assist in carrying out resettlement; once sites close or are reduced in size, these volunteer networks will become disengaged and eventually dissipate. In Wilmington, Delaware, for example, a site that opened in FFY 2017, the Jewish Family Services office has developed a coalition of 28 organizations and faith communities. The coalition consists of large numbers of local churches, including Presbyterian, Mormon, and Methodist churches, as well as mosques and synagogues—all eager to support refugees. They have, in fact, already prepared to welcome newcomers to their communities. Building these relationships, which are key to a site's operation, took months of staff time and resources before the site even opened. Thus, once a resettlement program or site is shut down or reduced in capacity, reopening or re-expanding it could take months or years, if it is able to be done at all. And, if an influx of refugees were later allowed in, HIAS and

its affiliates would be left with a diminished ability to serve that influx of refugees all at once.

17. Moreover, the existence of fewer sites within HIAS's resettlement affiliate network limits the type of assistance refugees can receive because it results in less variety in terms of specialization by site and ability within the network to welcome different kinds of refugees with different vulnerabilities. For example, one of the affiliate sites with which HIAS currently works has been specially set up to address the unique challenges faced by LGBTI refugees. The Jewish Family and Community Services East Bay in Walnut Creek, California, has developed a specialization in serving this population by connecting them to appropriate, available community resources. As another example, the Jewish Family Services of Buffalo and Erie County operates a program to serve deaf refugees, offering services otherwise unavailable from other HIAS affiliates. And the US Together site in Toledo is managed by a Resettlement Director who is from the Syrian community, and the site has staff with language and cultural competency to specifically serve this population. If some of these sites are forced to close due to funding and arrival cuts, the quality and range of specialized services that HIAS can provide to refugees facing special challenges will be diminished.

18. For these reasons, and in reliance on the Department of State's representation that it needed HIAS to take on increased numbers of refugees, HIAS began developing a formal plan to add new resettlement sites to its network and to expand existing sites. HIAS secured private funding and allocated funding

from HIAS's private fundraising to support affiliate program expansion. For example, prior to securing any public funding for new sites, HIAS gave some affiliates grant funding of between $50,000 and $100,000 to build their capacity. These were typically matched by local fundraising, all through private fundraising dollars.

19. In addition, in reliance on the Department of State's representation that it needed HIAS to take on increased numbers of refugees, two staff members were hired to develop new partnerships and conduct a thorough review to identify and develop strong new resettlement sites. This process included developing an index to measure a locality for its strength as a potential resettlement site, including analyses of affordable housing, job growth, and involvement in welcoming community efforts. HIAS's staff then developed relationships with various local organizations to gauge interest in site development over a period of several months. The process culminated in the selection of six new sites in Wilmington, Delaware; Pittsfield, Massachusetts; Niagara Falls, New York; Tacoma, Washington; Westchester, New York; and Madison, Wisconsin—all of which were approved by the Department of State to host 50 refugees each. While timelines may vary, a typical site may require an initial investment of approximately 9-12 months of effort and then additional years to strengthen the site and cultivate additional resources and relationships, allowing the site to scale to accept greater numbers of refugee arrivals. In addition, HIAS's staff invests considerable time into training and coaching employees

and volunteers at new sites, which is necessary because the refugee program is complex, involving extensive, detailed requirements.

20. Because of the Executive Orders' directives to drastically cut refugee admissions, several of these sites, which took months or even years to develop, already have suspended operations and may be forced to close. The resources expended to identify and establish these new sites, as well to expand several other existing sites, are not recoverable. For example, the new site in Wilmington invested in new staff, built community and volunteer relationships, and established the infrastructure for the new program. The program had expected to receive 50 refugees but has received only nine refugees so far, and anticipates just fourteen more. These numbers are insufficient to justify a continuing staff, and the agency faces a loss of initial funding.

21. Because of the devastating toll that the Executive Order will take on HIAS, its affiliates, and the services they provide, the injury and harm that HIAS will suffer is irreparable, HIAS cannot be made whole by a payment of damages at the end of this litigation.

22. HIAS's clients will also suffer irreparable injury as a result of the Executive Order. Clients already in the United States and clients who are allowed to enter will received diminished and more limited services than would otherwise be available through HIAS and its affiliates. Meanwhile, if the Executive Order remains in place, many clients will be denied entry entirely or their entry will be substantially delayed, leaving them in precarious situations.

23. At the time that the new Executive Order was signed on March 6, 2017, there were 61,467 approved refugees in the U.S. pipeline. This included 13,302 Somalis, 9,886 Iraqis, 7,879 Syrians, 1,666 Sudanese, 597 Iranians, and 28 Yemenis. These refugees were spread across the nine Resettlement Agencies, including HIAS.

24. Specifically, HIAS has identified 1,395 clients worldwide who were allocated through the Department of State process, have been vetted, and have been approved for refugee status. These refugees have already been allocated and assured to one of HIAS's resettlement sites. Of these, 512 are nationals of one of the six banned countries. Thus, these individuals—the overwhelming majority of whom are Muslim—will likely be ineligible for the case-by-case exception to the 120-day ban on refugee applicants set forth in Section 6(c) of the March 6 Executive Order.

25. Of the 1,395 HIAS clients worldwide who have been vetted, approved for refugee status, and allocated and assured to a HIAS site, only 58 (including 3 refugees from the six banned countries) have been scheduled for travel. This also includes 99 individuals who were intended to be booked for travel, and 338 individuals who were cleared for departure but are not yet scheduled to travel. These individuals will be prevented from travel as a direct result of the Executive Order, leaving them in precarious situations.

26. Even after the 120-day suspension on refugee admissions expires, most of these individuals will still be prevented or delayed from entering the United States, despite the fact that they have been vetted and

determined to be refugees. Under the Executive Order, the earliest that refugee resettlement could resume would be early July 2017. This would leave Resettlement Agencies, at most, with only two-and-a-half months before the end of the fiscal year to resettle hundreds or thousands of refugees who were supposed to be resettled over a much longer period of time. Refugee processing would be impacted by the 120-day ban since security checks and processing would be suspended during that time. Because security and medical clearances have expiration dates, it is likely that some refugees would lose their readiness for travel during the suspension period and lengthy checks would need to be repeated. In addition, because of the recent notice that HIAS's resettlement commitment will be cut by 39 percent, some of these refugees will simply not be able to enter the country in FFY 2017. Every day that these individuals' entry is delayed, they remain in precarious situations.

27. Many of HIAS's clients abroad whose refugee status has been approved but have yet to be scheduled for travel, including clients from the six banned countries, have family members in the United States, also HIAS clients, who will suffer as a result of the delay in reuniting with their family members. Some of these U.S. ties are, in fact, individuals who petitioned, applied, or sponsored their family members for refugee status (often through HIAS). For example, some HIAS clients have been granted refugee status through the Central American Minors program, which permits U.S. relatives of persecuted children in Central America to petition for these children to immigrate here.

These children remain in vulnerable and dangerous situations in their home countries, despite having been approved for refugee status, and their U.S. family members are forced to endure continued separation from and concern for these children.

28. More than 1,300 refugee applications initiated through HIAS by family members residing in the United States remain pending for HIAS clients abroad. Many include individuals living in the six Muslim-majority countries subject to the order's 90-day ban. The adjudication of these applications has been or will be substantially delayed because of the Executive Orders. In fact, since the orders were signed, consideration of most refugee applicant cases in need of security checks have been suspended. This means that, for many refugees in the pipeline, security checks that typically lasted 18-24 months will now be paused and restarted, potentially adding years to their wait for stable resettlement. The delay in processing of these applications will subject these clients to further risk of persecution and abuse in their current situations, and their family members who petitioned for them to come to the United States will remain in limbo as to whether they will ever be reunited.

29. The refugees that HIAS assists in entering the country are well-vetted by the U.S. government. These are individuals and families who are granted refugee status because they have fled their own countries due to persecution. These refugees are selected for third-country resettlement precisely because they have vulnerabilities that make continued residence in first countries of asylum or repatriation to their home

countries unsafe. They are people who simply want to live a life in safety and freedom, and, to my knowledge, none who have been assisted by HIAS has ever been implicated in any terrorist act. I've set forth in the paragraphs below just a few examples of HIAS clients who have been affected by the Executive Order and will likely be harmed by the drastic cut in the number of refugees that will be allowed to enter the United States this year.

30. Fawzia[1] is a Muslim Somali refugee who fled her country in 2011 because of the ongoing persecution. Her sister was raped and her brother was shot by armed groups in Somalia. Her family originally fled Somalia to India where she met and married her husband, another refugee of the civil war in Somalia. Fawzia, however, was resettled to the United States without her husband and has not seen him for two years. She talks to him every day and finds it extremely hard to live without him. Her husband is not yet scheduled to enter the United States.

31. Yessenia is a Salvadoran woman who has been living in the United States since 1999. She left her daughter behind in El Salvador and has created a new life for herself in this country. Yessenia, who has lawful status here, expects to soon marry her U.S. citizen fiancé. Her daughter Maria, however, has faced increased risk from the gangs in El Salvador. They have targeted her because she has family in the

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[1] All refugee and family names in this affidavit have been changed to protect client identities. Declarations are on file in HIAS' headquarters in Silver Spring, Maryland.

United States and have been extorting her. The gangs are threatening to kill Maria, her older brother, her grandmother (Yessenia's mother), and the rest of the family living in El Salvador. Children like Maria are victims of gang violence every day in El Salvador. Maria has been approved as a refugee through the Central American Minors program but is not yet scheduled to travel to the United States.

32. Magan is an elderly refugee from Somalia who has been in the United States for more than a year. He is waiting for his daughter and her children, his grandchildren, to join him in the United States through the refugee program. He reports that he has not been able to sleep since learning of the January 27 Executive Order for fear that they will be blocked from finally finding safety in the United States. Magan's family was scheduled to travel to the United States in February but their flight was cancelled after the first Executive Order was signed. Magan worries that he will die without seeing his daughter again, and as a Muslim, he reads the Quran and makes extra prayers for his family's health and safety. Magan feels that he has already suffered enough as he lost his first wife in the conflict in Somalia. He is waiting in the hope that he will be reunited with his family.

33. Elias, his sister, and his sister's children are Muslim refugees in the United States who fled the conflict in Syria. Elias and his sister arrived here without their mother and father, who fled Syria to Jordan four years ago when their lives were endangered. It is illegal for Elias's parents to work in Jordan so they are struggling financially, and heartbroken

over being separated from their children and grandchildren. They are only able to pay rent for an apartment because Elias sends them money. Elias knows his parents have already been interviewed three times by the UNHCR and the U.S. government but is waiting for further information.

34. Sunam is a lawful permanent resident, originally from Nepal, whose brother remains in a refugee camp in Eastern Nepal. Sunam's brother has been in the camp his entire life. Sunam knows how difficult life is in the camp, which she left in 2014 after being resettled in the United States. Sunam and her brother talk on the phone nearly every week. Sunam understands that the basic rations being delivered to the refugee camp have been cut off. Sunam does not know when they will come in again. Sunam's brother was fully approved to enter the United States as a refugee and was supposed to travel in June of 2016, but his travel was delayed for medical reasons and has not been rescheduled. Sunam hopes that her brother is able to join her soon.

35. Eden is a lawful permanent resident who came to the United States from Eritrea in 2010. She taught herself English, attends nursing school and has just applied for citizenship. Eden recently had her first child, a joyful occasion that was tinged with sadness because her mother could not be with her. Eden's mother remains in a precarious situation in Ethiopia, where she has been waiting to come to the United States as a refugee. She had to flee from Eritrea after being harassed for her religion as a Pentecostal Christian. Eden's mother has been fully vetted and

approved as a refugee, but her travel was cancelled around the time of the Executive Order and has not been rescheduled. Eden has not seen her mother for seven years. She worries about her getting older, with worsening health, and is desperate for her son to meet his grandmother.

36. Maung is a legal permanent resident who came to the United States three years ago as a refugee from Burma. He now owns and operates his own sushi business. Maung is waiting for his wife to join him in the United States. He does not remember the last time he saw her. Maung is very worried that his wife's refugee status will be rejected and her departure from Malaysia will be delayed. Maung's wife's refugee status has been approved, and she was assigned to HIAS for resettlement in the United States; however she is still waiting for travel to be scheduled.

37. Like Fawzia, Magan, and Elias, many of HIAS's clients here in the U.S. and abroad are Muslim. The Executive Order has taken a particular toll on them because of its anti-Muslim motivation and message. HIAS's Muslim clients have been marginalized in their communities as a result of the Executive Order. Clients report feeling that everyone wants to fight with them, and describe rumors of various attacks on mosques and other Muslims. Fawzia. for example, reports that her niece and sister, who are both in middle school, were attacked at school. Other students harassed the girls, called them names, told them to go back where they came from, and even pulled off their headscarves. HIAS clients report feeling isolated and anxious about

their situation and the future for their refugee relatives.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ MARK HETFIELD
MARK HETFIELD

Executed this 10th day Mar. 2017

EXHIBIT 1
to Hetfield Declaration

[redacted]

From: O'Connor, Margaret R <OconnorMR@state.gov>
Sent: Thursday, February 16, 2017 5:27 PM
To: [redacted]
Cc: PRM-Admissions-Domestic; Day, Barbara P; Sawyer, Carol T
Subject: FY 2017 RA Revised Budget Request
Attachments: RP Budget Summary and Detail Template - FY 2017 revisions.xls; RP Consolidated Placement Plan_FY2017 Revisions.xlsx

Dear colleagues,

With the adoption of Executive Order (EO) 13769, Protecting the Nation from Terrorist Activities by Foreign Nationals, PRM is implementing the revised target of 50,000 refugee arrivals and an estimated 15,000 SIVs for FY 2017.

Each agency's overall capacity will remain at the proportion of arrivals approved at the beginning of FY 2017 (for instance, if your agency was approved to resettle 10% of 107,000, you will now receive 10% of 65,000 arrivals). In order to issue funding for the remainder of FY 2017, PRM requires the submission of updated program and budget documents to reflect the revised ceiling of the U.S. Refugee Admissions Program. Your Program Officer will notify you of your revised approved network capacity for FY 2017.

We expect the updated Headquarters Management budget to reflect a careful assessment of the funding necessary to fulfill the revised workload expectations in a cost-efficient manner. It should be based on requirements to manage arrivals for the balance of FY 2017. Please consider if any

currently planned program activities should be canceled or postponed. Proposals should include an outline of the specific actions being taken to adjust staffing, organizational structure and management, and other activities to appropriate levels. We understand that significant changes to affiliate networks, headquarters staffing, and other program requirements may have associated costs, however, we expect that revised full-year budgets will reflect savings from the significant reductions in estimated arrivals.

Please include the following documents by **Friday, March 3, 2017**:

- FY 2017 budget showing funds awarded to date (October 2016-March 2017), Q3 and Q4 projected needs, and full-year funding requirements
    - Please use the attached template and submit as an excel spreadsheet

- Revised budget narrative (with changes tracked) detailing any new or updated activities to right-size the network (e.g. travel costs associated with restructuring or closing a site)

- Updated consolidated placement plan (attached) reflecting your revised capacity
    - Include a narrative detailing the strategy used un determining the revised plan

- Executive Summary outlining all changes from the originally-approved proposal, including staffing and operational changes and their associated impact on the budget

- Signed completed SF-424 and SF-424A

- Most recent Negotiated Indirect Cost Rate Agreement (NICRA)

- Signed and dated cover letter

PRM plans to issue additional per capita awards in early March given the robust arrivals through February. We will provide additional details in the coming weeks. Quarter 3 Headquarters Management awards will be issued after the proposed program adjustments have been finalized.

Please contact your Program Officer with any questions. Send your revised proposals to me and your Program Officer by **March 3, 2017.**

Sincerely,
Margaret

Margaret O'Connor
Budget Analyst, Refugee Admissions · Bureau of Population, Refugees, and Migration · U.S. Department of State
2025 E Street NW, Washington, DC 20520 | phone: 202.453.9262| fax: 202.453.9393| email: oconnormr@state.gov
Official
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EXHIBIT 2
to Hetfield Declaration

[redacted]

From: Jones, J Irving <JonesJI2@state.gov>
Sent: Friday, February 17, 2017 10:37 AM
To: [redacted]
Subject: HIAS Revised FY 2017 Capacity

Hi [redacted]

Your revised capacity for FY 2017 is below. This includes SIVs

CAPACITY & ARRIVALS	ESTABLISHED AGENCY CAPACITY	% by agency	REVISED CAPACITY - 65,000
HIAS	4,794	4.5%	2,912

Let me know if you have any questions

Regards,
Irving

Irving Jones
Program Officer for Domestic Resettlement, Refugee Admissions · Bureau of Population, Refugees, and Migration U.S. Department of State
2025 E Street NW, Washington, DC 20520 | phone: 202.453.9248| fax: 202.453.9393| email: JonesJI2@state.gov

This email is UNCLASSIFIED.

Official
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EXHIBIT 3
to Hetfield Declaration

From: Gauger, Kelly A [GaugerKA@state.gov]
Received: Monday, 06 Mar 2017, 1:56PM
To: [redacted] Havana - Refugee [Havana-Refugee@state.gov]; [redacted]
CC: Ruken, Stephen I (Istanbul) [RukenSI@state.gov]; Ward, Robert C [WardRC@state.gov]; Sen, Anjalina M [SenAM@state.gov]; Johnson, Courtney E [JohnsonCE3@state.gov]; Lane, Nathan P [LaneNP@state.gov]; Dowl, Aimee M (Kampala) [DowlAM@state.gov]; Stalls, Fnail R [StallsER@state.gov]; Anderson, Todd D (Havana) [AndersonTD@state.gov]; Kassem, Gina B (Amman) [KassemGB@state.gov]; Pilch, Jacquelyn J [PilchJJ@state.gov]; Bongiovanni, Kristin (Baghdad) [BongiovanniK2@state.gov]; Aguilo, Patricia M (Erbil) [AguiloPM@state.gov]; Munson, Jessica N [MunsonJN@state.gov]; Shaw, Gregory (Bangkok) [SHAWGJ@state.gov]; Garmize, Kristina X (Amman) [GarmizeKX@state.gov]; Wingate, Patrick R [WingatePR@state.gov]; Tikvart, Daniel J (Kabul) [TikvartDJ@state.gov]; [redacted] Van Brandt, Danna J [VanBrandtDJ@state.gov]; Pickering, Margaret S [PickeringMS@state.gov], PRM-Admissions Office [PRM-AdmissionsOfficeDL@state.gov]
Subject: Message #8: Update on Refugee Admissions and Operations

Dear colleagues,

A new Executive Order was signed today calling for, among other things, a suspension of the USRAP program for 120 days, to take effect on March 16 at 12:01 am Eastern Daylight Time. All passengers (including refugees and visa 93 holders of all nationalities) already on ABN for arrival at their port of entry through the end of March 15 are permitted to travel as planned. No further bookings may be made.

Iraqi and Afghan SIVs are exempt from the Executive Order and may travel as usual.

In addition, RSCs should adhere to the following processing guidance.

-UNHCR has halted referrals, with several exceptions already agreed between PRM and individual RSCs. During the 120-day pause, RSCs are authorized to continue to pre-screen referrals that are already in the pipeline. RSCs may also accept urgent protection/ medical referral requests from UNHCR during the 120-day period, with the approval of their PRM Program Officer. These cases should mainly be those with U.S. ties.

-Direct application programs may continue accepting new applications during the 120-day pause. Employment verification and pre-screening activities may continue.

-DHS interviews continue to be suspended until further notice, unless exceptions are arranged with individual RSCs. When requesting DHS interviews for urgent protection/medical cases, please consult your PRM Program Officer first.

-No new IAC or SAO security checks may be requested, except for urgent protection/medical cases or other cases approved by PRM/A to travel on an exceptional basis during the 120-day period. IAC and SAO re-requests as a result of new/additional information (biodiffs) should not be requested unless cases are approved by PRM/A for travel. All CLASS checks (new or re-requests) can continue to be requested.

-RSCs should request new assurances only for cases that have been approved for travel during the 120-day period. No other new assurances should be requested at this time. Assurance requests already in process will continue.

-Until further guidance is provided, RSCs may continue the following processing activities:

-Employment verification

-Pre-screening

-Class requests

-Medicals, as required for cases that have been approved by PRM for travel (either before and after the EO implementation date)

-Cultural orientation, as required for cases that have been approved by PRM for travel (either before and after the EO implementation date)

-Communications/responses to case inquiries

-The freeze on all hiring and expansion activities remains in effect until further notice.

-Cleared messaging for all RSCs to use with refugees and USRAP partners regarding the suspension is below. Please continue to clear ALL media/press requests with PRM/Admissions and PRM/Press in Washington.

Message to all RSCs for posting on websites or in public areas:

- **As stated in the Executive Order signed by the President, the United States government has suspended all refugee admissions for 120 days, effective March 16 at 12:01 a.m., eastern daylight time. Certain limited exceptions when in the national interest and when admission of the applicant would not pose**

a risk to U.S. security or welfare will be considered on a case-by-case basis.

- **The suspension does not impact the cases of refugees already approved for refugee status who have been extensively screened, approved for admission to the United States, and scheduled for departure through March 15. Those individuals will continue to enter the United States through end of March 15.**

- **The Resettlement Support Center (RSC) is currently maintaining all case information and biodata on file for all refugees who have been referred for resettlement to the United States.**

- **For questions from refugees in XXX assisted by XXX, you may write to XXX@XX if you wish to provide information on emergency situations or update your contact information.**

- **As we receive additional guidance, we will update this website xxxxx.com.**

Official

UNCLASSIFIED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF BETH BARON, PRESIDENT OF MIDDLE EAST STUDIES ASSOCIATION, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF BETH BARON, PRESIDENT OF MIDDLE EAST STUDIES ASSOCIATION

I, Beth Baron, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the President of the Middle East Studies Association ("MESA"), a Plaintiff in the above-captioned case. In this capacity, I chair the Board of Directors, act as chief executive officer of the association, and respond to the interests and concerns of MESA members.

2. I am also a Professor of History at the City College and Graduate Center of the City University of New York. I was the editor of the *International Journal of Middle East Studies* from 2009 to 2014 and

am the author of numerous books and articles in Middle Eastern history. I regularly supervise graduate students and am familiar with the normal research practices of MESA members and the importance of international travel for both students and professors.

3. MESA is a non-profit learned society that brings together scholars, educators, and those interested in the study of the Middle East from all over the world. From its inception in 1966 with 51 founding members, MESA has increased its membership to more than 2,400 and now serves as an umbrella organization for fifty-five institutional members. MESA's membership includes both graduate students and faculty working in the field of Middle East studies.

4. MESA and its members will be seriously harmed by the Executive Order issued on March 6, 2017 ("the Executive Order").

5. MESA has members who are from the six countries designated in the Executive Order and who are outside the United States. I understand that individuals in those circumstances who lack visas will not be able to obtain visas to travel to the United States under the terms of the Executive Order. This inability to come to the United States impacts MESA members' ability to attend academic conferences, including an annual meeting sponsored by MESA discussed below. For example, I am aware of an Iranian MESA member who is a doctoral student in Germany, who will not be able to travel to the United States for conferences, including the MESA conference which she firmly planned to attend, because the Executive Order will prevent her from obtaining a visa. Participation in

academic conferences is crucial to the professional success of both graduate students and professors, and to their ability to fully engage with the ideas and scholarship of the broader Middle East studies community. Many important conferences, including the MESA annual meeting, take place in the United States.

6. Graduate students who are MESA members or are studying under MESA members in the United States often leave the country to complete field work or library and archival research for advanced degrees. I am aware that many such students from the six designated countries fear exclusion from the United States because of the Executive Order if they leave the country. Students who do not leave the United States, because they lack an assurance they will be permitted to reenter, will miss out on opportunities to engage in research and participate in academic conferences. This is a serious hindrance to their academic careers, as research in this field is often best conducted abroad —and sometimes can only realistically be conducted abroad. Likewise, as noted above, participation in international conferences is a crucial part of the development of an academic career, and many major conferences in this field take place abroad.

7. Students in these circumstances will also lose their ability to visit family and friends abroad with an assurance they will be permitted to reenter. For example, I have learned of Iranian students affiliated with MESA who have cancelled plans to return home for Persian New Year, an important holiday that will occur on March 21, because of the Executive Order. Missing out on the chance to return home for Persian

New Year is for many Iranian students comparable to Americans missing the chance to return home for the Thanksgiving holiday.

8. MESA members who are U.S.-based faculty will be impacted by the Executive Order because potential students from the designated countries will be unable to obtain visas to study with them in the United States. Similarly, for the reasons explained above, their current U.S.-based students from the designated countries will not be able to travel abroad for field work with an assurance they will be permitted to reenter. Students' decisions to forego international travel will impact faculty members' ability to facilitate quality research and educational opportunities, which is both critically important to faculty members' pedagogical and academic mission and will impact their ability to attract students, obtain grants, and produce scholarship.

9. Likewise, U.S.-based MESA faculty members will forego opportunities to travel abroad for research and academic conferences for fear that they will not be readmitted, or will be subjected to harassment or discrimination upon application for reentry to the United States. MESA has already been in communication with a number of faculty members who plan to forego international travel for these reasons.

10. MESA members will also be precluded from traveling to the designated countries for research or academic conferences when those countries institute reciprocal actions in response to the Executive Order. Iran restricted the issuance of certain visas to U.S. citizens in response to the prior, January 27 version of the Executive Order. A meeting of a MESA affiliated

organization, the Association for the Study of Persianate Societies, planned for this month in Shiraz, Iran, was cancelled because of Iran's response to the prior version of the Executive Order. I am aware of at least one MESA member who was scheduled to present an academic paper at that conference but has now lost the opportunity to do so.

11. A large number of MESA members are Muslim or are institutional members whose officers, employees, or members are Muslim. I have heard from many Muslim members—colleagues, students, and friends—that they understand the message of the prior and current versions of the Order to be an attack on Islam. They have expressed the concern that the Orders marginalize them and they fear that they will be singled out for suspicion, interrogation, search, and discrimination because of the anti-Muslim message of these Orders.

12. MESA itself will also be harmed by the Executive Order. As part of its goal to advance learning, facilitate communication, and promote cooperation, MESA sponsors an annual meeting that is a leading international forum for scholarship, intellectual exchange, and pedagogical innovation. Approximately thirty percent of MESA members are based outside of the United States and must travel to the United States to attend MESA's annual meeting. At least 46 citizens of the six designated countries traveled to the United States to attend the last annual meeting. MESA expects that a substantial number of scholars will be unable to attend this year's meeting because of the restrictions imposed by the Executive Order.

13. MESA expects that, in part because of the stigmatic message of the Executive Order, many members based in Europe and the Middle East are likely to heed international calls to boycott academic conferences in the United States in protest of the Executive Order, including the MESA annual meeting. Academic conferences, and the MESA annual meeting in particular, are most successful when a variety of backgrounds and viewpoints are represented.

14. The absence of these scholars from the designated countries and from other countries will have a substantial negative effect on the meeting. These and other effects of the Executive Order will negatively impact MESA's mission of fostering the study and public understanding of the Middle East.

15. In addition, the Executive Order will cause serious financial harms to MESA. A large portion of MESA's annual budget is funded through annual membership dues and registration fees to attend the annual meeting. In 2016, annual meeting revenue was 47% of our overall revenue. This revenue represented the largest single source of income for MESA.

16. For each individual who cannot or will not attend the annual meeting, MESA will lose $90 to $250 in registration fees. We do not yet know how many individuals will forego registration and attendance at the meeting because of the travel ban. However, we anticipate significantly reduced registration and attendance, in part based on the reduction in the number of academic papers submitted for the meeting.

17. MESA's meetings held in Washington, DC, have had higher attendance and paper submission rates than our meetings held in other cities. MESA has consistently maintained and typically exceeded submission numbers in each successive DC meeting. In 2017, for the first time in 24 years, MESA has had a substantial decline in submissions from one DC meeting (2014) to another (2017). 133 fewer people submitted papers as part of pre-organized sessions in 2017 than in 2014. Applications for the 2017 meeting were due by February 15, 2017, shortly after the original Executive Order was signed.

18. Assuming based on this decline that, at a minimum, 133 people would have registered and attended the meeting but for the Executive Order, the loss of meeting registration would be approximately $18,000. However, MESA anticipates greater financial loss as people other than those who would have submitted papers but did not do so decide not to attend the meeting and thus do not pay the registration fee because of the Executive Order.

19. Likewise, I am aware that some individuals who cannot or will not attend the meeting will allow their MESA membership to lapse as a result. For each such lapsed membership, MESA will lose $25-300 in membership dues.

20. There are additional potential financial impacts if registration for the DC meeting is lower than it has been in previous years. MESA has a performance clause in its contract with the Marriott Wardman Park Hotel, the location of the 2017 meeting. MESA guarantees that it will fill a minimum number of room

nights and any shortfall must be paid by MESA. The penalty is equal to the single room rate for each night MESA falls short. MESA may be subject to this penalty because of the Executive Order.

21. MESA has already experienced a negative financial impact from the Executive Order, which is reflected in the lower submission numbers and loss of revenue. MESA anticipates that the decline in revenue it has already experienced because of the Executive Order will continue for the rest of the year if the Executive Order is in effect.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ BETH BARON
BETH BARON

Executed this 10th day Mar., 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF JOHN DOE # 1 IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF JOHN DOE #1

I, John Doe #1, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746, and declare as follows:

1. I am a Lawful Permanent Resident of Iranian origin, and I live in Silver Spring, Maryland.

2. I came to the United States in 2014 on a J1 visa. I am a scientist who studies atmospheric and natural hazards. In 2016, I obtained my lawful permanent resident (LPR) status through the National Interest Waiver program for people with extraordinary abilities.

3. In August 2016, while my application to become a lawful permanent resident was pending, I

married an Iranian national. My wife lives in Tehran. She has been alone in Tehran since her mother's unexpected death in 2013.

4. My wife and I are non-practicing Muslims, but under Iranian law, a child born to a Muslim father is automatically considered to be Muslim. Conversion from Islam is deemed apostasy and is punishable by death.

5. My wife and I applied for a spousal immigration visa so that she could join me in the United States. Her application was approved on November 3, 2016. As of January 9, 2017, we had submitted all requisite documentation, paid the processing fees, and were waiting for notification that an embassy interview was scheduled.

6. Based on the information published by the National Visa Center, I expected my wife's interview to be scheduled in no more than six weeks. At the time the first Executive Order went into effect, we were near this six-week mark. However, after the Executive Orders went into effect, I have been told by the National Visa Center that the processing time has been extended to eight weeks.

7. When the new Executive Order was announced, I called the National Visa Center again, in the hopes that my wife's interview can be scheduled before the new Order goes into effect. With each day that passes, that window closes. And, even if she does manage to get an interview, the new Executive Order will still halt any further processing, putting us back where we started.

8. I would like to visit my wife in Iran, but I am afraid to make any travel plans because I do not want to risk not being able to return to the United States, even as a legal permanent resident. The confusion surrounding the first Executive Order, the constantly changing landscape, and the fact that the revised Executive Order is so similar to the first makes me worry that leaving the country is too risky. I could be denied entry or detained and questioned.

9. This also affects my job. Sometimes my work requires me to travel internationally, for example to attend conferences, but I feel I cannot do that at this time because I may not be permitted to re-enter the United States.

10. The Executive Order's travel ban on Iranian nationals has created significant fear, anxiety, and insecurity for my wife and I regarding our future. We simply cannot know what will happen, and if the delays will go for months and months only to result in a denial. The government calls it temporary but the language of the ban, the statements that have been made about banning Muslims from entering, and the broader context suggests otherwise. The waiver for hardship provides us with no reassurance. What is a hardship? What is that process? And there is so much confusion. I read a news report from the BBC about the embassy in Afghanistan delaying processing even before the new Executive Order goes into effect.

11. The ban forces me to choose between my career and being with my wife, who remains in Tehran. Moreover, even though we are married, her day-to-day life is difficult because she is, in many practical

respects, living as a single woman. I can't be there for her to help her. Based on all the information that was out there about the process, we believed we would be together by this spring—or sooner. The more time passes, the harder and harder it is for us and the more pressure there is for me to give up my career here. But I do not know how to proceed because of the uncertainty—whether to keep working here, and keep hoping, while time passes, or whether to return, despite everything I would give up in doing so.

12. In addition, the anti-Muslim views that are driving the Executive Order, as well as the Order itself, have caused significant stress and anxiety for me. I worry that I may not be safe in this country, despite being invited to the U.S. by a university in order to contribute to the academic community in my initial visa.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at Silver Spring, Maryland, on March 10, 2017.

/s/ [REDACTED]
JOHN DOE #1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF JOHN DOE # 3 IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF JOHN DOE #3

I, John Doe #3, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a Lawful Permanent Resident of Iranian origin, and I live in Linthicum, Maryland.

2. I came to the United States in 2011 through the greencard lottery. I worked as a teacher in Iran and currently work in the engineering field.

3. I recently applied to become a naturalized citizen, and the petition remains pending with U.S. Citizenship and Immigration Services.

4. My wife, who is also an Iranian national, lives in Iran. She and I married in the summer of 2014. In

October 2014, I applied for an immigration visa on her behalf.

5. In May 2016, my wife had her interview at the U.S. Embassy. At the time, she was informed that her documentation was complete and she needed to wait for administrative processing, but that she should be able to join me in two or three months. She therefore resigned from her job and began preparing to join me in the United States.

6. The Executive Order puts our future in peril, as it has delayed, and could prevent, my wife from obtaining her visa and joining me in the United States.

7. Moreover, the Executive Orders and the delays and uncertainty they have caused have placed extraordinary stress upon our relationship and my relationship with my in-laws. At this point, we have been forced to live apart from each other, without each other's companionship for more than two and a half years. We live in different time zones, eight hours apart, and thus even communicating by phone requires planning. The only way for us to see each other is for me to travel to Iran, at great expense. Moreover, I only have 15 days of leave per year at my job.

8. The effect of the Executive Order has been to convince my wife and her family that it will be impossible for us to live together in the United States because the process will just keep being delayed or denied. We are starting to feel desperate. We are young and our lives are passing. We are delayed in starting our lives together and building our family. My wife has been particularly devastated by the Executive Order,

feeling like her life is in total limbo and each day makes it worse.

9. In fact, we have gotten to the point where my father-in-law asked me to leave the United States and go back to Iran because the Executive Order means that there will be even more delay and may mean that my wife can never come to the U.S.. It has been difficult for me to be placed in a position of feeling like I may be forced to choose between staying in the U.S. and the life I have started building here, and my wife, who I love dearly and want here with me. My wife and I have never had a significant disagreement in our relationship until the Executive Orders. It has been exhausting for us. We are being torn apart by this situation and the uncertainty and delay.

10. Since moving to the United States, I have returned to Iran on several occasions to visit my wife. I had planned to visit her in February 2017, but I canceled these plans because of the Executive Order. I fear that if I leave the United States to see my wife, I will not be permitted to reenter the country or could be detained by immigration officials upon my return. I have no faith that the Executive Order won't be applied to me, or that a new Executive Order won't be issued, or that I won't be detained and interrogated upon my return, based on news reports of what has been happening to others and the total chaos of the first Executive Order.

11. Because of this fear, if I do end up needing to visit Iran for a family matter or to see my wife, I need to plan for what will happen to my apartment, my car, my savings, and the various pieces of my life here, if I

am detained or refused entry. But I am also afraid that anything I do will be regarded with suspicion.

12. The anti-Muslim attitudes that are driving this Executive Order have caused me stress and anxiety and made me question whether I even belong in this country despite everything I have sacrificed and invested in making a life here.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at Linthicum, Maryland, on March 10, 2017.

/s/ [REDACTED]
JOHN DOE #3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF MOHAMMED METEAB

I, Mohammed Meteab, upon my personal knowledge, hereby submit this declaration pursuant 28 U.S.C. § 1746 and declare as follows:

1. I am a lawful permanent resident of Iraqi origin, and I live in Springfield, Massachusetts.

2. I came to the United States in 2015 as a refugee, along with my wife and two children. All of us are now lawful permanent residents. My third child, who was born in the United States, is a U.S. citizen.

3. I am one of five brothers. We lived together with our families in Iraq. During and after the 2003 invasion of Iraq, my brothers and I all cooperated with the U.S. military, helping to establish the transitional government in the wake of the conflict in Najaf, Iraq.

4. Because of our cooperation with the U.S. government, we received threats and were shot at by armed militia groups in Iraq. In 2013, my brother

Abdullateef found a note for us from the League of the Righteous milita saying we had to leave Najaf or be killed.

5. I am a Sunni Muslim, as are my brothers. We lived in a Shi'a neighborhood in Najaf, Iraq.

6. In 2013, my family received death threats because we were Sunni. We were warned by neighbors and members of the community that we would be killed if we stayed. A few days after receiving death threats, my nephew was shot in the leg. On December 25, 2013, my older brother Shareef, his children, and two of our nephews (Abdullateef's sons, Walid and Mosad, who was shot, and their wives), fled to Jordan.

7. Eleven days later, on January 5, 2014, I fled to Jordan with my wife and our two children. My three other brothers, Ahmed, Abdullateef, and Ali, joined us in Jordan in 2014. Like my wife, children and I, my brothers applied for refugee status soon after arriving in Jordan.

8. My wife, two children, and I were approved as refugees in March 2014.

9. On August 20, 2015, my wife, children, and I came to the United States as refugees. My nephew Walid and his wife were also approved and came to the U.S. as a refugee in July 2015. My older brother Shareef and his children also came to the United States as refugees in August 2015. Shareef's daughter and her husband, Mosad (who had been shot in Iraq) came to the United States in December 2015.

10. My remaining three brothers, Ahmed, Abdullateef, and Ali, had also applied for refugee status in 2014. Ahmed and Ali were approved for resettlement in the United States in 2016. In April 2015, Abdullateef was approved for resettlement in Canada. He is still in Jordan, awaiting final clearance to go to Canada.

11. In November 2016, Ahmed and Ali, who were still in Jordan, were informed by the International Organization for Migration that while their refugee applications had been approved, my brothers and their families still did not have travel documents to come to the United States. Jewish Family Services gave me this update at the same time.

12. I expected that my brothers and their families would arrive in the United States in early 2017. However, when I learned from the news about the Executive Order in January, I realized my brothers would not be able to join us in the United States.

13. My brothers are living as refugees in Jordan. Like me, they fled threats to their lives in Iraq and were looking forward to starting a new life and sending their children to school here in the United States. Because of the January and now the updated Executive Order, they continue to live in insecurity as refugees awaiting resettlement.

14. Because of the Executive Order and official anti-Muslim sentiment motivating it, I have felt isolated and disparaged in my community. It is causing me and my wife a lot of mental stress. Particularly when my wife, who wears a hijab, and I are in public, I sense a lot of hostility from people around me. For example,

at crosswalks, people refuse to stop their cars for us, and I see people staring at us. My wife doesn't not want to go outside the house except for doctors' appointments. My nieces, who wear hijab to school, say that people make mean comments and stare at them for being Muslim. One day, a student pulled the hijab off of my niece's head in class. On another occasion, as my niece was getting off the school bus, an older woman came up to her and pushed her to the ground.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed in Springfield, Massachusetts, on March 10, 2017

/s/ MOHAMMED METEAB
MOHAMMED METEAB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL., DEFENDANTS

DECLARATION OF JANE DOE #2

DECLARATION OF JANE DOE #2

I, Jane Doe #2, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a United States Citizen of Syrian origin, and I live in Mecklenburg County, North Carolina.

2. I am currently enrolled in college and studying to become a healthcare technician.

3. My sister was born in Damascus, Syria, where she grew up and spent most of her life. She is married and has two young boys, aged 7 and 2. In 2012, government planes bombed her neighborhood in Damascus and destroyed her house. She and her family fled to the home of her parents-in-law with nothing but their passports and the clothes on their backs. After remaining with her in-laws for several weeks, my sister and

her family eventually moved to a home about two hours outside of Damascus, but shelling eventually reached that town, too.

4. While internally displaced within Syria, my sister and her husband heard rumors that the Syrian government's selective service would eventually be expanded to include men over the age of 30. After my sister's husband saw some of his friends taken for the selective service, she told him to flee to Yemen, because only Yemen and Sudan accept Syrian refugees without visas. She stayed behind in Syria with their first child, pregnant with their second, because as a teacher, she was a government employee and was required to apply for government approval to stop working and leave the country. She remained in Syria, enduring constant shelling of their town, until she received permission from the government to leave work, at which point she fled to Yemen with her child to join her husband.

5. In Yemen, my sister's family registered with the United Nations High Commissioner for Refugees and received a temporary protection certificate explaining that they should be protected from forcible return to Syria. They remained in Yemen for approximately a year and a half, but war broke out in the country six or seven months after they arrived and the capitol, where they were staying, was soon besieged. They had no electricity, fuel, clean water, or food. Her husband had to risk his life to leave the city every day to find food and clean water for them because no trucks could enter the city to deliver supplies.

6. War engulfed the capitol and at one point, the house where my sister's family was staying was taken over by insurgents as a site for launching shells. She and her children, including her newborn baby, were locked into a room for three to four days while insurgent militiamen used their house to fire rockets. In the meantime, her husband, who had left to find food, was prevented from entering. After the insurgents finally left, my sister and her husband fled that same day for the Saudi Arabian border.

7. My sister's family is now in a refugee hotel on the Saudi Arabia-Yemen border and living in terrible, life-threatening conditions. They endure regular shelling from the Yemeni side of the border; where they live is shelled so often that the local school is open only one or two days a week, if at all. The building in which they live is infested with bugs; human refuse from the bathroom of the unit above them leaks into their room. They are constantly sick and their children are throwing up all the time. The Saudi Arabian government often turns off the power to the building in an attempt to make the living conditions there so intolerable that the refugees will leave.

8. Discrimination against Syrian refugees in Saudi Arabia is severe. My sister's husband searches for work every day, but is often cheated out of his wages and kicked out of jobs without payment because he is Syrian. Because her husband is gone during the day, my sister must remain inside with her children; if she went out in public by herself, it is unquestionable that she would be abducted because she is a woman and a Syrian. The only time she and her children are able to

leave the room where they are staying is at night, when her husband returns home and can accompany them outside. For this reason, their children did not believe that the sun rose and set in Saudi Arabia for the first year they were in the country because they room where they were staying had no windows. Her children never have the opportunity to play outside, but instead remain in their room for most of the day. During the rare times that they are able to emerge from the building at night, my sister's younger son cries and tries to run away whenever they have to return to the hotel.

9. My sister's older son always asks her, "When am I going to have friends?" He has not been able to make any friends because he is rarely able to go to school or to interact with other children and his entire life has been a continual experience of displacement.

10. I am very worried that my participation in this lawsuit against federal government officials could jeopardize my sister's visa application. My I-130 petition for her is currently pending. Once approved for an I-130 visa, she will be able to access the U.S. Refugee Admissions Program (USRAP) through the Priority-2 Direct Access Program for Iraqi and Syrian Beneficiaries of Form I-130 Petition for Alien Relatives. I do not want my participation in this lawsuit to adversely impact either her visa or refugee applications and delay or prevent her from joining me in the United States.

11. I fear that whether or not my sister's visa and refugee application are denied, my participation in this case could result in harassment of me and my sister. Persecution of Syrian refugees in Saudi Arabia is rampant, and the Saudi Arabian government tries to

make conditions difficult for Syrian refugees in the country. I fear that if my identity is made public, it would be easy to identify her as well, making her susceptible to harassment or further persecution.

12. While participating in this lawsuit is important to me, I am also fearful that my participation may lead to me and my family being targeted for harassment if my identity were made public.

13. Even as a United States citizen, I am fearful of leaving the United States because I am afraid the Executive Order may result in difficulty or harassment upon my return to the United States.

14. I am aware of the reports indicating that harassment and violence targeting Muslims has been on the rise recently. In fact several of my friends have experienced such harassment on account of their perceived or actual religious affiliation. I am aware of the shooting at the mosque in Quebec and the bombings of mosques here in the United States.

15. For these reasons, I feel that my personal security and that of my family necessitates that I be allowed to proceed under a pseudonym.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed at Mecklenburg County, North Carolina, on March 10, 2017.

/s/ [REDACTED]
JANE DOE #2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No.: 8:17-CV-00361-TDC

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PLAINTIFFS

v.

DONALD TRUMP, ET AL, DEFENDANTS

DECLARATION OF IBRAHIM ADMED MOHOMED

I, Ibrahim Ahmed Mohomed, upon my personal knowledge, hereby submit this declaration pursuant 28 U.S.C. § 1746 and declare as follows:

1. I am a citizen of the United States, and I live in Columbus, Ohio. I came to the United States as a refugee in 2009. I am Muslim.

2. I applied for refugee protection because I am a member of a minority claim in Somalia. When I lived in Mogadishu, where I worked as a street vendor, I was targeted and threatened by majority clans who knew I did not have protection.

3. In 2011, I petitioned for my wife and nine children to join me in the United States. In 2013, they were all approved to come to the United States as refugees. They are currently in Ethiopia waiting for authorization to travel to the United States.

4. After the January 27 Executive Order was signed, my family and I learned on the news that they would not be able to come to the United States as they are awaiting refugee resettlement and Somali nationals.

5. I was preparing to welcome my wife and children to the United States. I am worried that my children are not receiving adequate medical care or education in Ethiopia. Because they speak a different language in Ethiopia, my children are unable to go to school in Ethiopia.

6. My wife and children rely on me for financial support. I have not been able to see them since 2015. Because of this order, my family will not be able to join me, we continue to be separated, and my family's lives are in limbo.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed in Columbus, Ohio on March 10, 2017

/s/ IBRAHIM 03-10-17
IBRAHIM AHMED MOHOMED